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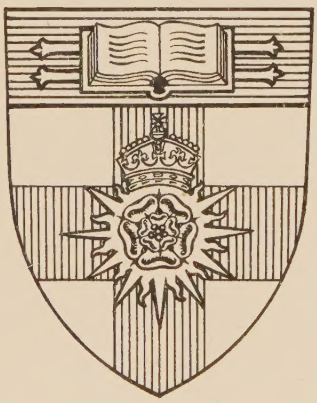

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Page	*Line*	*For*	*Read*
292	32	"15 L. J. (C.P.) 50," ..	"18 L. J. (C.P.) 50."
361	note (7) ..	"Law Rep. 5 C. P. 251." ..	"Law Rep. 3 C. P. 388."

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Abel *v.* Lee	365
Adams, Thorpe *v.*	125
Alison, Bank of Hindustan *v.*	25, 222
Allen *v.* Tunbridge	481
Allendale, Mather *v.*	272
Alliance Bank *v.* Kearsley	433
Alsop, Cross *v.*	315

B.

Bank of Hindustan *v.* Alison	54, 222
Banque de Credit Commercial *v.* De Gas	142
Barker, Easterbrook *v.*	1
Barnett, Church *v.*	116
Bechervaise *v.* Great Western Railway Company	36
Bermondsey Vestry *v.* Ramsey	247
Bocking *v.* Jones	29
Bond *v.* St. George, Hanover Square	312
Brinsmead *v.* Harrison	584
Brodrick *v.* Scalé	98
Bude and Torrington Railway Company, Lee *v.*	577
Bulwer, Nicholls *v.*	281
Burch, Ellis *v.*	327
Bustros *v.* Lenders	259
Buxton, Lomax *v.*	107
Byerley *v.* Prevost	144

C.

	PAGE
Calder *v.* Dobell (Ex. Ch.)	486
Chamberlain *v.* King	474
Champneys, Reg. *v.*	384
Church *v.* Barnett	116
Cope, Rolleston *v.*	292
Cross *v.* Alsop	315
Currie, Murray *v.*	24

D.

De Gas, Banque de Credit Commercial *v.*	142
Denton, Warburton *v.*	267
Dobell, Calder *v.* (Ex. Ch.)	486
Dudman, Vigar *v.*	470

E.

Easterbrook *v.* Barker	1
Ellis *v.* Burch	327
—— *v.* M'Henry	228
Etheridge, Woodhouse *v.*	570
Everton, Liverpool Gaslight Company *v.*	414
——— Overseers, Ex parte	245

G.

Gann *v.* Johnson	61

PAGE

Good *v.* London Steam Ship Owners' Association 563
Giles, Melsom *v.* (Ex. Ch.) 532
Gravenor *v.* Watkins (Ex. Ch.) 500
Great Western Railway Company, Bechervaise *v.* 36
——————, Parkinson *v.* 554
——————, Talley *v.* 44

H.

Harrison, Brinsmead *v.* 584
Hayne *v.* Pratt 105
Hayter *v.* Phillipson 38
Hemming *v.* Williams 480
Home Assurance Association, Richards *v.* 591
Hughes, Whincup *v.* 78

J.

Jeffrey *v.* Neale 240
Johnson, Gann *v.* 461
Jones, Bocking *v.* 29

K.

Kearsley, Alliance Bank *v.* 433
King, Chamberlain *v.* 474
—— *v.* Zimmerman 466

L.

Lee, Abel *v.* 365
—— *v.* The Bude and Torrington Junction Railway Company 577
Lenders, Bustros *v.* 259
Levy, Newington *v.* (Ex. Ch.) 180
—— *v.* Rutley 523
Lidgett *v.* Secretan 616
Liverpool Gaslight Company *v.* Everton 414
Lomax *v.* Buxton 107
London and South Western Company, Smith *v.* (Ex. Ch.) 14

PAGE

London Steam Ship Owners' Association, Good *v.* 563
Lovegrove *v.* White 440

M.

Mahony *v.* National Widows' Life Assurance Fund (Limited) 252
Mather *v.* Allendale 272
Meier, Rouse and, In re 212
Melsom *v.* Giles (Ex. Ch.) 532
Metropolitan Railway Company *v.* Wilson 376
M'Henry, Ellis *v.* 228
Moeser *v.* Wisker 120
Murray *v.* Currie 24

N.

National Widows' Life Assurance Fund, Mahony *v.* 252
Neale, Jeffrey *v.* 240
Newall *v.* Tomlinson 405
Newington *v.* Levy (Ex. Ch.) 180
Nicholls *v.* Bulwer 281
Norwich Election Petition 147

O.

Oppenheim *v.* White Lion Hotel Company 515

P.

Palmer and London, Brighton, and South Coast Railway Company, In re 194
Parkinson *v.* Great Western Railway Company, In re 554
Phillipson *v.* Hayter 38
Pratt, Hayne *v.* 105
Prevost, Byerley *v.* 144

R.

Ramsey, Bermondsey Vestry *v.* 247
Reg. *v.* Champneys 384
Richards *v.* Home Assurance Association 591

PAGE

Rogerson, Stewart *v.* 424
Rolleston *v.* Cope 292
Rouse and Meier, In re 212
Russell *v.* The Tithe Commissioners 596
Rutley, Levy *v.* 523

S.

Sandilands, In re 411
Scalé, Brodrick *v.* 98
Secretan, Lidgett *v.* 616
Simpson *v.* Smith 87
Smith *v.* London and South Western Railway Company (Ex. Ch.) 14
——, Simpson *v.* 87
Stevens *v.* Tillett (Norwich Election Petition) 147
Stewart *v.* Rogerson 424
St. George, Hanover Square, Bond *v.* 312
St. Margaret's Burial Board *v.* Thompson 445
St. Mary Abbott, Kensington, Taylor *v.* 309

T.

Talley *v.* Great Western Railway Company 44
Taylor *v.* St. Mary Abbott, Kensington 309
Thomas, Turner *v.* 610
Thompson, St. Margaret's Burial Board *v.* 445
——— *v.* Ward 327
Thorpe *v.* Adams 125
Tillett, Stevens *v.* 147
Tithe Commissioners, Russell *v.* 596
Tomlinson, Newall *v.* 405
Tunbridge, Allen *v.* 481
Turner *v.* Thomas 610

V.

Verity, Wilkinson *v.* 206
Vigar *v.* Dudman 470

W.

Warburton *v.* Denton 267
Ward, Thompson *v.* 327
Watkins, Gravenor *v.* (Ex. Ch.) 500
Whincup *v.* Hughes 78
White, Lovegrove *v.* 440
White Lion Hotel Company, Oppenheim *v.* 515
Wilkinson *v.* Verity 206
Williams, Hemming *v.* 480
Wilson, Metropolitan Railway Company *v.* 376
Wisker, Moeser *v.* 120
Woodhouse *v.* Etheridge 570

Z.

Zimmerman, King *v.* 466

TABLE OF CASES CITED.

A.

		PAGE
Adams *v.* Broughton	2 Str. 1078	588
Addison *v.* Gandasqui	4 Taunt. 574	488, 494
Alder *v.* Park	5 Dowl. 16	214
Allen *v.* Thompson	1 H. & N. 15	100
Allsopp *v.* Day	7 H. & N. 457	146
Amalia, The	1 Moo. P. C. (N.S.) 471	233, 236
Anglo-Danish and Baltic Steam Navigation Company (Shalgreen and Carroll's Case)	Law Rep. 3 Ch. Ap. 323	593
Anonymous	Cro. Eliz. 9	504
Aranguren *v.* Scholfield	1 H. & N. 494	467
Armani *v.* Castrique	13 M. & W. 443, 447	236
Armistead *v.* Wilde	17 Q. B. 261	518
Ashby *v.* Harris	Law Rep. 3 C. P. 523	452
Astbury *v.* Henderson	15 C. B. 251	296
Astle *v.* Wright	23 Beav. 77	80
Atkinson *v.* Fosbroke	Law Rep. 1 Q. B. 628	37
Attorney-General *v.* Great Northern Railway Company	1 Dr. & S. 154	200
——— *v.* Lloyd	1 Ves. Sen. 32	512
Atwood *v.* Maude	Law Rep. 3 Ch. Ap. 369	80
Avery *v.* Bowden	6 E. & B. 953, 974	40, 42, 210

B.

Bagot, Lord, *v.* Williams	3 B. & C. 235	175
Bahia and San Francisco Railway Company, Re	Law Rep. 3 Q. B. 584	66, 67
Baker *v.* Greenhill	3 Q. B. 148	242, 243
——— *v.* Sayers	17 L. T. 579	585
Ballantine *v.* Golding	Cook's Bk. Law, 419	234
Banbury *v.* White	2 H. & C. 300	100, 101, 102, 104
Bandon, Earl of, *v.* Becher	3 Cl. & F. 479	239
Bank of Australasia *v.* Nias	16 Q. B. 717	239
Barfield *v.* Nicholson	2 S. & S. 1, 6	525
Barker *v.* Janson	Law Rep. 3 C. P. 303	620, 621, 628, 629, 631
Barnes *v.* Peters	Law Rep. 4 C. P. 539	319, 329
Barnett *v.* Brandao	6 M. & G. at p. 640	589

		PAGE
Barraclough *v.* Greenhough	Law Rep. 2 Q. B. 612	96
Barrett and Great Northern Railway Company, Re	1 C. B. (N.S.) 423	199
Barrow *v.* Buckmaster	12 C. B. 664	297, 298
Bartlett *v.* Gibbs	5 M. & G. 81	287
Bartley *v.* Hodges	1 B. & S. 375	234, 236
Bauman *v.* Vestry of St. Pancras	Law Rep. 2 Q. B. 528	88, 89, 91, 92, 96
Baxendale and Great Western Railway Company, Re. Reading Case	5 C. B. (N.S.) 309, 336	199, 201, 204, 561
——— and London and South Western Railway Company, Re	12 C. B. (N.S.) 758	199
Bayley *v.* Buckland	1 Ex. 1	442
——— Ex parte	9 B. & C. 691	80, 81, 85
——— *v.* Griffiths	1 H. & C. 429	37
Beadell and Eastern Counties Railway Company, Be	2 C. B. (N.S) 509	199, 200
Beamish *v.* Stoke	11 C. B. 29	295, 296, 299, 300, 301, 306, 307, 309
Beckham *v.* Drake	9 M. & W. 79, 92, 96	436, 490
Bedingfield *v.* Freak	Cro. Eliz. 467; 1 Eag. & Young, 118; 2 Inst. 490; Rolle, 651; Co. Litt. 85 b.	472
Bennett's Case	Crow. Eliz. 9	504
Bermondsey (Vestry) *v.* Ramsey	Law Rep. 6 C. P. 247	585
Bevins *v.* Hulme	15 M. & W. 96	442
Bidgood *v.* Way	2 W. Bl. 1236	378
Bird *v.* Randall	3 Burr, at p. 1353; W. Bl. at p. 373, 384	585
Birks *v.* Allison	13 C. B. (N.S.) 12	278, 285
Blackburn *v.* Smith	2 Ex. 783	80
Blackett *v.* Royal Exchange Association	2 C. & J. 244	630
Bloxam's Case	33 Beav. 529	593
Blyth *v.* Birmingham Waterworks Company	11 Ex. 781	17, 18, 19, 21
Boast *v.* Firth	Law Rep. 4 C. P. 1	85
Bocking *v.* Jones	Law Rep. 6 C. P. 29	484
Boydell *v.* Walthall	Moore, 722	504
Brand *v.* Hammersmith Railway Company	Law Rep. 4 H. L. 171	21
Brewer *v.* M'Gowan	Law Rep. 5 C. P. 239, at p. 244	329, 332, 346, 361
Bristol Case	5 C. B. (N. S.) 309	201
Brooke *v.* Pickwick	4 Bing. 218	48
Brookman *v.* Smith	Law Rep. 6 Ex. 291	512
Brown *v.* Tanner	Law Rep. 2 Eq. 806; 3 Cha. App. 597	428
——— *v.* Wootton	Cro. Jac. 73; Yelv. 67; Moore, 762	585, 586
Buckland *v.* Johnson	15 C. B. 145	585, 587, 588, 589
Bullen *v.* Sharp	Law Rep. 1 C. P. 86	4, 11
Buller *v.* Harrison	2 Cowp. at p. 568	410
Burdeaux *v.* Lancaster	1 Salk. 332	452
Burgess *v.* Clements	4 M. & S. 306	518
Burroughes *v.* Bayne	5 H. & N. 296	407
Burrows *v.* Jemino	2 Stra. 733	234
Butcher *v.* London and South Western Railway Company	16 C. B. 13	48, 49, 50, 51

C.

	PAGE
Cairncross *v.* Lorimer	3 Macq. 827, 829 . 65, 66
Callard *v.* Callard	Cro. Eliz. 344 . . . 504
Calye's Case	8 Co. Rep. 32 (a), 33 (a) 518, 520, 523
Camelford Case	Corb. & D. 239 . 153, 164
Campbell *v.* Fleming	1 Ad. & E. 40 . . 64
Canterbury Case	Clifford's Southwark Case, 353, 357 152, 163, 179
Carden *v.* General Cemetery Company	5 Bing. N. C. 253 . . 580
Carnarvon Case	Per. & Kn. 106; Cock. & R. 127 150
Cary *v.* Longman	1 East, 357 . . . 525
Case *v.* Storey	Law Rep. 4 Ex. 319 . 483, 484
Cashill *v.* Wright	6 E. & B. 891, 895 518, 519, 521, 523
Castledine *v.* Munday	4 B. & Ad. at p. 95 . . 377
Castrique *v.* Imrie	Law Rep. 4 H. L. 414 . . 239
Cheltenham Case	1 Pow. R. & D. 224, 226 150, 153, 163, 179
——— and Great Western Union Railway Company *v.* Daniel	2 Q. B. 281 . . 64, 223
Christ's Hospital, Governors of, *v.* Harrild	2 M. & G. 707 . . 242
Cirencester Case, The	2 Fraser, 445 . . 319, 339
Clare County Case	Wolf. & Br. 191 150, 153, 163
Clarke *v.* Dickson	E. B. & E. 148 . . 223
——— *v.* Stanford	Law Rep. 6 Q. B. 357 483, 484, 485
Claxton *v.* Swift	2 Show. at p. 498 . . 585
Cleve *v.* Mills	Cook's Bank. Law, 297 . 231
Clinch *v.* Financial Corporation	Law Rep. 4 Ch. Ap. 117, 122 67, 68
Coan *v.* Bowles	1 Show. 165 . 380, 381, 382
Cocke *v.* Jennor	Hob. 66 . . . 585
Collins *v.* Evans	5 Q. B. at p. 823, per Tindal, C.J. 585
Connop *v.* Challis	2 Ex. 484 . . . 442
Cook *v.* Humber	11 C. B. (N.S.) 33 316, 317, 319, 329, 331, 333, 334, 335, 336, 338, 341, 344, 345, 348, 350, 354, 356, 359
Cooke *v.* Seeley	2 Ex. 746 . . 436, 438
Cooper and London and South Western Railway Company, Re	4 C. B. (N.S.) 738 . . 201
——— *v.* Shepherd	3 C. B. 266 . 207, 585, 589
——— *v.* Simmons	7 H. & N. 707 . . 80
——— *v.* Slade	1 E. & E. 336 . . 462
Copland *v.* Bartlett	6 C. B. 18 295, 296, 297, 298, 300, 301, 306, 307, 308, 309
Corbet *v.* Barnes	Sir W. Jones, 377 . . 585
Cornman *v.* Eastern Counties Railway Company	4 H. & N. 781 . . . 17
Cossey *v.* Brighton Railway Company	Law Rep. 5 C. P. 146 . 255, 257
County of York, West Riding, Southern Division, Case	1 O'Mal. & Hard. 213 . . 149
Cox *v.* Hickman	9 C. B. (N.S.) 47; 8 H. L. 268 4, 5, 6, 11
Craven *v.* Stubbins	34 L. J. (Ch.) 126 . . 80
Cromwell *v.* Benjamin	41 Barbour, 558 . . 40
Cropper *v.* Cook	Law Rep. 3 C. P. 194 . . 493
Cross *v.* Alsop	Law Rep. 6 C. P. 315, p. 319, n. 339, 360, 364, 367

		PAGE
Higgins *v.* Senior	8 M. & W. 834	488, 490 493, 495, 496, 499
Hirst *v.* Tolson	2 Mac. & G. 134	78, 80, 82, 83, 84, 85
Hitcham *v.* Murcham	Noy. 4.	585
Hitchins *v.* Brown	2 C. B. 25	285, 287
Hochster *v.* De La Tour	2 E. & B. 678	210
Holland *v.* Russell	1 B. & S. 424; in error 4 B. & S. 14	407, 408, 409, 410
Holmes *v.* Wilson	10 Ad. & E. 511	585, 590
Honey *v.* Rice	2 Roll. Rep. 224	585
Hopkins *v.* Adams	20 Vt. 407.	469
Horn *v.* Kilkenny and Great Southern and Western Railway Company	1 K. & J. 399	581
Howitt *v.* Stephens	5 C. B. (N.S.) 30	285
Howley *v.* Knight	14 Q. B. 240	208
Hudson *v.* Granger	5 B. & Ald. 27.	613
Hughes *v.* Buckland	15 M. & W. 346	477
Hull Flax and Cotton Mill Company *v.* Wellesley	6 H. & N. 38	64, 66, 67, 70, 223
Hunt *v.* Silk	5 East, 449	80
Hutton *v.* Cruttwell	1 E. & B. 15	110, 113, 114, 115, 116

I.

Imperial Bank of China *v.* Bank of Hindustan	Law Rep. 6 Eq. 91	63, 68, 73, 223
International Company (Levita's Case)	Law Rep. 3 Ch. Ap. 36	593, 594, 595, 596
Irish Peat Company *v.* Phillips	1 B. & S. 598	66
Irwin *v.* Gray	19 C. B. (N.S.) 585; S. C. in Ex. Ch. Law Rep. 1 C. P. 171; in H. L. Law Rep. 2 H. L. 20	378, 381

J.

Jolly *v.* Rees	15 C. B. (N.S.) 628	40
Jones *v.* Bubb	Law Rep. 4 C. P. 468	368
—— *v.* Dowle	9 M. & W. 19	207
—— *v.* Festiniog Railway Company	Law Rep. 3 Q. B. 733, 735	18
—— *v.* Jones	Law Rep. 4 C. P. 422	285, 290
Judson *v.* Luckett	2 C. B. 197	346

K.

Keane *v.* Beard	8 C. B. (N.S.) 372	435
Keller *v.* Phillips	12 Tiffany (American) R. 351, 40 Barbour, 390	40
Kelly *v.* Solari	9 M. & W. 54	408
Keyworth *v.* Hill	3 B. & Ald. 685, 688	585
King *v.* Butterworth	2 C. & P. 391	126, n
—— *v.* Hoare	13 M. & W. 494	251, 585, 586, 587
Kingston, Duchess of, Case	2 Sm. L. C. 6th ed. 679	182
Kirk *v.* Blurton	9 M. & W. 284	434, 435
Knight *v.* Faith	15 Q. B. 649	622, 630

L.

		PAGE
Lamb *v.* Williams	1 Salk. 88	442
Lane *v.* Ironmonger	13 M. & W. 368	41
Langmead *v.* Maple	18 C. B. (N.S.) 255, 270	188
Latuch *v.* Pasherante	1 Salk. 86	442
Laurie *v.* Douglas	15 M. & W. 746	568
Law *v.* Skinner	2 Wm. Bl. 996.	113, n.
Le Bret *v.* Papillon	4 East, 502	182, 378
Le Cheminant *v.* Pearson	4 Taunt. 367	621
Le Couteur *v.* London and South Western Railway Company	Law Rep. 1 Q. B. 54, 59	49, 50, 51
Lee *v.* Gansel	Cowp. 1	329, 358, 361
—— *v.* Hutchinson	8 C. B. 16	296, 298, 306
Leete *v.* Hart	Law Rep. 3 C. P. 322	477, 478, 479
Lens *v.* Browne	1 C. & P. 224	126, 131, 134, 136, 139
Leo, The	Lush. Adm. R. 444, 447	428, 431
Leroux *v.* Brown	12 C. B. 801	232
Levi *v.* Abbott	4 Ex. 588	442, 444
Levita's Case	Law Rep. 3 Ch. Ap. 36	67, 593
Lewis *v.* Owen	4 B. & Ald. 654	230, 234, 237
—— *v.* Rucker	2 Burr. 1167	621
Lister *v.* Perryman	Law Rep. 4 H. L. 521	476
Livie *v.* Janson	12 East, 648	622, 625
Livingston *v.* Bishop	1 Johns. 290	585
Lloyd *v.* Freshfield	2 C. & P. 325	435, 439
—— *v.* Guibert	6 B. & S. 100; in error, Law Rep. 1 Q. B. 115	238
London and Blackwall Railway Company *v.* Limehouse Board of Works	3 K. & J. 123	130
—— and Northern Insurance Corporation, Re (Stace and Worth's Case)	Law Rep. 4 Ch. Ap. 682	66, 67, 70, 223
—— and Westminster Loan and Discount Company *v.* Chace	12 C. B. (N.S.) 730	101, 102
Lover *v.* Davidson	1 C. B. (N.S.) 182	527
Lovejoy *v.* Murray	3 Wallace, 1	585
Lyme Regis Case	1 Pow. R. & D. 25	149
Lyn *v.* Wyn	Bridg. C. P. 122, 127	130, 135
Lynch *v.* M'Kenny	Cited 2 H. Bl. 554	235
Lyne *v.* Wyatt	18 C. B. (N.S.) 593	232
Lury *v.* Pearson	1 C. B. (N.S.) 639	261

M.

Mackersy *v.* Ramsays	9 Cl. & T. 818	462
Markin *v.* Aldrich	11 C. B. (N.S.) 599	397
Marsh *v.* Conquest	17 C. B. (N.S.) 418	526
Marshall *v.* Jackson	4 E. & B. 669	378
Marston *v.* Phillips	9 L. T. (N.S.) 289	585
Mascall *v.* Price	1 Eag. & Young, 227	472
Mawdesley *v.* Parke	Cited 1 H. Bl. 680	231
Mayor of London *v.* Cox	Law Rep. 2 H. L. 239	143, 144
Mercer *v.* Peterson	Law Rep. 2 Ex. 304	110, 115, 116
Mills *v.* Bayley	2 H. & C. 36	213, 214, 216, 219, 220, 221
Milner *v.* Milnes	3 T. R. 627	378
Mitchell *v.* Woods	16 L. T. (N.S.) 676	518

		PAGE
Monks *v.* Dykes	4 M. & W. at p. 569	348, 358
Monypenny *v.* Monypenny	9 H. L. C. 114	286
Moody *v.* Corbett	5 B. & S. 859	130
Moore *v.* Carisbrooke	12 C. B. 661	295, 298
Moorhouse *v.* Gilbertson	14 C. B. 70	296, 298
Morgan *v.* Ravey	6 H. & N. 265	518
——— *v.* Tarte	11 Ex. 82	214
Morris and Morris, Re	6 E. & B. 383	214, 216
——— *v.* Robinson	3 B. & C. 196, at p. 206	585, 590
Mortimer *v.* M'Callan	6 M. & W. 58	494
Morton's Case	Cro. Eliz. 30	585
Mostyn *v.* Fabrigas	1 Sm. Lead. Cas. 6th ed. 623, 662	231
Munster *v.* South Eastern Railway Company	4 C. B. (N.S.) 676	51
Murphey *v.* Caralli	3 H. & C. 462	25

N.

National Savings Bank Association (Hebb's Case)	Law Rep. 4 Eq. 9	593
Newcastle-under-Lyne Case	Bar. & Aust. 564	151
New Theatre Company (Bloxam's Case)	33 Beav. 529	593
Newton *v.* Rouse	1 Vern. 460	83
New Zealand Banking Corporation, Re (Sewell's Case)	Law Rep. 3 Ch. Ap. 131	65, 67, 69, 70, 223
Nichols *v.* Davis	Law Rep. 4 C. P. 80	452
——— *v.* Roe	3 My. & K. 431	217
Nicholson and Great Western Railway Company, Re	5 C. B. (N.S.) 366	199, 201, 202, 557
——— *v.* Ricketts	2 E. & E. 497	436
Northallerton Case	O'Mall. & Hard. at p. 170	313

O.

Oakes *v.* Turquand	Law Rep. 2 H. L. 325	64, 223
Odwin *v.* Forbes	Buck, 57	234
Ogden *v.* Saunders	12 Wheat. 213	230
Onions *v.* Bowdler	5 C. B. 65	287
Oxlade and North Eastern Railway Company, Re	1 C. B. (N.S.) 454	199

P.

Paice *v.* Archbishop of Canterbury	14 Ves. 364	504
Painter, Re	2 C. B. (N.S.) 702	484
Palmer, Re	3 H. & N. 26	532
——— *v.* London and Brighton Railway Company	Law Rep. 6 C. P. 194	557
——— and London and South Western Railway Company, Re	Law Rep. 1 C. P. 588	199, 200, 202, 203, 205
Paramour *v.* Yardley	Plowd. 541	504
Parish *v.* Sleeman	1 D. F. & J. 326, 327	242, 243
Parry *v.* Jones	1 C. B. (N.S.) 339	397
Parton *v.* Williams	3 B. & A. 330	476
Paterson *v.* Gandasequi	15 East, 62, 68	488, 494
Paynter *v.* James	Law Rep. 2 C. P. 348	428, 430
Pearce *v.* Rector of Clapham	3 Hagg. 16	452, 456

		PAGE
Peek *v.* North Staffordshire Railway Company	4 B. & S. 627	462, 463, 464, 467
Pellatt's Case	Law Rep. 2 Ch. Ap. 527	593, 596
Pennell *v.* Reynolds	11 C. B. (N.S.) 709	109, 110
Peterborough Case	2 Pow. R. & D. 287	151
Pewtress *v.* Harvey	1 B. & Ad. 154	246
Philipson *v.* Earl of Egremont	6 Q. B. 587	239, 581
Phillips *v.* Allan	8 B. & C. 477, 481	231, 234, 235, 237
——— *v.* Eyre	Law Rep. 6 Q. B. 1, 28	234
Philliskirk *v.* Pluckwell	2 M. & S. 393	378
Philpott *v.* Kelley	3 A. & E. 106	207
Philpotts *v.* Reed	1 B. & B. 294	237
Pickard *v.* Bretz	5 H. & N. 9	100
——— *v.* Sears	6 Ad. & E. 474	66
Plant *v.* Cotterill	5 H. & N. 430	207
Potter *v.* Brown	5 East, 124	234
——— *v.* Campbell	16 W. R. 399	619, 629
Powell *v.* Guest	18 C. B. (N.S.) 72	310, 314
——— *v.* Price	4 C. B. 105	334
Prankerd, Ex parte	3 B. & A. 257	80, 84
Price *v.* Groom	2 Ex. at p. 548	4
Priestly *v.* Fernie	3 H. & C. 977	489, 585
Pryme's Case	Wolf. & Dew. 51	311

Q.

Quebec Fire Assurance Company *v.* St. Louis	7 Moo. P. C. 286	621
Quelin *v.* Moisson	1 Knapp, 265, 266, n.	234

R.

Ransome and Eastern Counties Railway Company, Re	1 C. B. (N.S.) 437; 4 C. B. (N.S.) 135	199, 201, 202
Rawlings *v.* Morgan	18 C. B. (N.S.) 776	622, 626
Reading Case	5 C. B. (N.S.) 336	201
Redmayne *v.* Burton	2 L. T. (N.S.) 324	468
Redpath *v.* Wigg	Law Rep. 1 Ex. 355	4, 5, 6, 11, 13
Reed *v.* Cowmeadow	6 Ad. & E. 661	476, 477
Reeve *v.* Palmer	5 C. B. (N.S.) 84, 91	207, 211
Reg. *v.* Ashton	Sayer, 159	452
—— *v.* Biggleswade Union	21 L. T. 494	416, 417, 419
—— *v.* Dean of Hereford	Law Rep. 5 Q. B. 196	388
—— *v.* Eyre	6 E. & B. 992; 7 E. & B. 609	418
—— *v.* Peterborough Justices	7 E. & B. 643	418, 422
—— *v.* Sevenoaks	7 Q. B. 136	422
—— *v.* West Riding of Yorkshire Justices	E. B. & E. 713	419, 422
Rex *v.* Eyles	Cald. 407	319
—— *v.* Hull Dock Company	5 D. & R. 359	367
—— *v.* Justices of Devon	8 B. & C. 640, n.	418, 421
—— *v.* Justices of Essex	1 B. & A. 210	417, 418
—— *v.* Justices of Kent	8 B. & C. 639	418, 421
—— *v.* Kealing	1 Dowl. 440	246
—— *v.* Kingsclere	2 Lev. 18	451
—— *v.* Liverpool	3 T. R. 118	451
—— *v.* Mayor of Eye	9 Ad. & E. 670, 677	319, 329, 358, 361

		PAGE
Richards *v.* London, Brighton, and South Coast Railway Company	7 C. B. 839	47, 48, 50
Richardson *v.* Gilbert	1 Sim. (N.S.) 336	527
Richmond Hill Hotel Company (Pellatt's Case)	Law Rep. 2 Ch. Ap. 527	593, 596
——— *v.* Smith	8 B. & C. 9	518
Ridout *v.* Pain	3 Atk. 486, 492, 493	504
Roberts *v.* Orchard	2 H. & C. 769	476, 478, 479
Robinson *v.* Dunkley	15 C. B. (N.S.) 478	295, 296, 299, 300, 302, 303, 307, 308
——— *v.* Dunmore	2 B. & P. 416, at p. 419	48, 50
Roe d. Reade *v.* Reade	8 T. R. 118	396
Roger's Case	Leach's C. C. 90	348
Rose *v.* Hart	8 Taunt. 499	611
—— *v.* M'Leod	4 S. & D. 308	231, 236
Ross *v.* Hill	2 C. B. 877	49
Rothwell *v.* Humphreys	1 Esp. 406	436
Routh *v.* Roublot	1 E. & E. 850	101
Royal Bank of Scotland *v.* Cuthbert	1 Rose, 462, 486	235
Rudd *v.* Scott	2 Scott, N. R. 631	477
Ryder *v.* Wombwell	Law Rep. 4 Ex. 32, 38	40

S.

Sadler *v.* Henlock	4 E. & B. 570, 578	25
Santos *v.* Illidge	8 C. B. (N.S.) 861	231
Savil *v.* Savil	Fort. 351	387
Savory *v.* Chapman	11 A. & E. 829	442
Score *v.* Huggett	7 M. & G. 95	331, 347, 362
Scott *v.* Lord Seymour	1 H. & C. 219; in error, ibid. 231	233
—— *v.* Pilkington	2 B. & S. 11	239
—— *v.* Uxbridge and Rickmansworth Railway Company	Law Rep. 1 C. P. 596	579, 581
Seddon *v.* Tutop	6 T. R. 607	175
Sewell's Case	Law Rep. 3 Ch. Ap. 131	223
Shalgreen & Carroll's Case	Law Rep. 3 Ch. Ap. 323	593
Shand *v.* Grant	15 C. B. (N.S.) 324	407, 408
Sheffield and Manchester Railway Company *v.* Woodcock	7 M. & W. 574	64, 223
Shepherd *v.* Conquest	17 C. B. 427	530
Sherlock *v.* Steward	7 C. B. (N.S.) 21	298
Sherratt *v.* Bentley	2 M. & K. 149	504, 506, 512
Short *v.* Spackman	2 B. & Ad. 962	499
Shrimpton *v.* Sidmouth Railway Company	Law Rep. 3 C. P. 80	579, 581
Sidaway *v.* Hay	3 B. & C. 12	231, 235, 237
Sims *v.* Bond	5 B. & Ad. 389	436, 611
—— *v.* Brittain	4 B. & Ad. 375	436
Smethurst *v.* Mitchell	1 E. & E. 623	489
Smith *v.* Buchanan	1 East, 6	230, 234
—— *v.* Lancaster	Law Rep. 5 C. P. 251	361
—— *v.* O'Brien	26 L. J. (Ex.) 30	117
Soam *v.* Bowden	Finch, 396	83
South Carolina Bank *v.* Case	8 B. & C. 427	435
Southampton Case	Rogers on Elections, 10 Ed. 461, note m.	149
Southwark Case	Clifford, 131	151, 152
Stace and Worth's Case	Law Rep. 4 Ch. Ap. 682	682

		PAGE
Stamper *v.* Sunderland	Law Rep. 3 C. P. 388	319, 351, 361, 364
Staple Inn *v.* Holborn Union	2 H. & C. 284	131
Stephenson *v.* Hart	4 Bing. 476	558
Stewart *v.* London and South Western Railway Company	3 H. & C. 135, 139	48, 49
——— *v.* Steele	5 Scott, N. R. 517.	621, 630
——— *v.* Todd	9 Q. B. 767, at p. 769	175
St. George, Hanover Square *v.* Sparrow	16 C. B. (N.S.) 209	89, 91, 92, 95, 96
Stokes *v.* Twitchin	8 Taunt. 492	82
St. Pancras Vestry *v.* Batterbury.	2 C. B. (N.S.) 477	249
Sweet *v.* Benning.	16 C. B. 459	525

T.

Taunton Case	Law Rep. 4 C. P. 361	149, 152, 166
Taylor *v.* St. Mary Abbott	Law Rep. 6 C. P. 309	313
Tear *v.* Freebody	4 C. B. (N.S.) 228	90, 95
Thomas *v.* Thomas	3 B. & C. 825	512
Thomson *v.* Davenport	2 Sm. L. C. 6th ed. 338; 9 B. & C. 78, 86	488, 494, 498
———, Re	1 Ex. 864	81, 83
——— *v.* Ward	Law Rep. 6 C. P. 327	322
Thorpe *v.* Adams	Law Rep. 6 C. P. 125	394
Tidswell *v.* Whitworth	Law Rep. 2 C. P. 326	243
Toms *v.* Luckett	5 C. B. 23	347, 348, 361
Trotter *v.* Watson	Law Rep. 4 C. P. 434	268
Trueman *v.* Loder	11 Ad. & E. 589	490
Tubervil *v.* Stamp	1 Salk 13	18
Tucker, Ex parte	4 M. & G. 1079	246
Turner *v.* Baynes	2 H. Bl. 559	208
Tuton *v.* Sanoner	3 H. & N. 280	100

U.

Ulrich *v.* Litchfield	2 Atk. 372	504
Universal Banking Corporation (Gunn's Case)	Law Rep. 3 Ch. Ap. 40	593, 594, 595, 596
——— Company (Harrison's Case)	Law Rep. 3 Ch. Ap. 633	593, 595

V.

Vanquelin *v.* Bouard	15 C. B. (N.S.) 341	239
Vaughan *v.* Taff Vale Railway Company	3 H. & N. 743; in error 5 H. & N. 679	18, 21
——— *v.* Menlove	3 Bing. N. C. 468	18, 19
Victor, The	Lush. Adm. R. 72	428
Vynior's Case	8 Co. Rep. 81 b	217, 219

W.

		PAGE
Walsh *v.* Southworth	6 Ex. 150	452
—— *v.* Trimmer	Law Rep. 2 H. L. 208	463, 602, 604
Wandsworth Board of Works *v.* Hall	Law Rep. 4 C. P. 85	89, 92
Warburton *v.* Great Western Railway Company	Law Rep. 2 Ex. 30	25
Watters *v.* Smith.	2 B. & Ad. at p. 892, per Tenterden, C.J.	585
Waygood *v.* James	Law Rep. 4 C. P. 361	149, 152, 162, 166
Wedge *v.* Berkeley	6 Ad. & E. 663	477
Westbury Case	1 O'Mal & Hard. 47	177
West Cornwall Railway Company *v.* Mowatt	15 Q. B. 521	64, 223
—— India and Pacific Steam Shipping Company, Re	W. N. 1868, 112	223
—— *v.* London and North Western Railway Company	Law Rep. 5 P. C. 622	557
Whiteacres *v.* Hamkinson	Cro. Car. 75	585
Whithorn *v.* Thomas	7 M. & G. 1	313
Willett *v.* Chambers	Cowp. 814	436
Williams *v.* Archer	5 C. B. 318	207, 211
——— *v.* Gesse	3 Bing. N. C. 849	211
——— *v.* Pritchard	4 T. R. 2	130, 141
Wilson *v.* Roberts	11 C. B. (N.S.) 50	329, 355
Woolley *v.* North London Railway Company	Law Rep. 4 C. P. 602	37, 257, 258
——— *v.* Pole	14 C. B. (N.S.) 538	255, 256, 258
Worseley *v.* De Mattos	1 Burr. 467	112, 113, 114
Wright *v.* Stockport	5 M. & G. 33	347

Y.

Young *v.* Moeller	6 E. & B. 681	462, 463

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

MICHAELMAS TERM, XXXIV VICTORIA.

EASTERBROOK AND ANOTHER *v.* BARKER AND ANOTHER. 1870 *Nov.* 10.

Bankrupt—Deed of Inspectorship and Composition under the Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134)—*Liability of Trustees.*

By a deed of composition under the Bankruptcy Act, 1861, the debtor assigned all his lands, goods, &c., to trustees, and covenanted that he would carry on or wind up his business under their superintendence and control, and that all moneys, &c., accruing in respect of the business should be deposited in a bank, and that he would act under the direction of the trustees in relation to the carrying on or winding up of the business. The trustees were impowered to employ any other person to effect the purposes of the deed, and to draw and accept bills, &c., for carrying on the business, and to make advances; and it was provided that all moneys received by the trustees should be applied, first, in payment of the costs of the deed, next, of debts incurred in carrying on the business and of their advances, and, lastly, in payment to the debtor of such sums as the trustees should think fit to allow him as a remuneration for his trouble; the surplus to be held in trust for the debtor. Then came a proviso that the trustees were to be answerable each for his own acts or defaults only, and a declaration that, if the instalments of the composition should be duly paid, all the real and personal estate, surplus moneys, &c., should be re-transferred to the debtor for his own absolute use and benefit; and a further proviso that, if any instalment should be unpaid, the trustees should hold and realize the estate upon trust to pay all

1870

EASTERBROOK v. BARKER.

expenses, &c., including the debts incurred in carrying on and winding up the business, and then pay the creditors rateably in full; and the deed concluded with a declaration that it was intended to operate as an inspectorship and composition deed under the Bankruptcy Act, 1861.

After the execution of the deed, the debtor continued to manage the business as before, paying all moneys received by him to a banking-account kept by the trustees. The trustees met at the works weekly, inspected the books, and furnished the debtor with money to meet all disbursements which would be required during the ensuing week for wages, materials, and petty-cash; but they gave him no authority to pledge their personal credit.

In an action for goods supplied to the works upon orders given by the debtor in his own name:—

Held, upon the authority of *Redpath* v. *Wigg* (Law Rep. 1 Ex. 335), that, the whole scope of the deed being, not to transfer the business to the trustees, but that it should remain the business of the debtor, though carried on by him under the inspectorship and control of the trustees, the latter were not liable for goods supplied to the debtor upon credit.

APPEAL from a decision of the judge of the county-court of Yorkshire holden at Sheffield.

1. The action was for goods sold and delivered. The particulars of demand were as follows:—

1867. July 1.	One permanent way cramp for binding bridge rails, to order .	3	5	0
Aug. 6.	Four ratchet-braces, O 12, 14 16*s.* 6*d.*	3	6	0
	Two do O 12 each 16 to 22, 18*s.*, 24*s.*	2	2	0
		£8	13	0

2. The defendants were the trustees of a creditors' deed, dated 19th December, 1866, duly registered under the Bankruptcy Act, 1861, executed by a debtor named John Parkin, who carried on business in Harvest Lane, Sheffield, as a manufacturer in the steel trade. The material provisions of this deed are set out in the judgment.

3. It was proved at the trial that the goods were supplied in consequence of the receipt by the plaintiffs, engineers and machinists, of two orders, dated in June and August, 1867. The first of these orders had been lost; the second was in the following form:—

"Steel Works, Harvest Lane, Sheffield. August 2, 1867.

"Easterbrook & Allcard, for John Parkin.

"O 148. 4 ratchet-braces, O 12, 14 over all, and 7 over all, top to bottom.

"O 152. 1 ratchet-brace 16*s.*
1 do do 22*s.* } O 12."

4. There was no direct evidence to shew by whom these orders were sent; but the forms were shewn to be taken out of an order-book, which order-book was annexed to the case. This book was used at the dates in question on the premises in Harvest Lane, the written part being filled in, and counterfoils of the orders being left in the book, and the orders themselves being taken and delivered to the plaintiffs or to their clerk.

5. It was admitted that the goods mentioned in the order were delivered at the works in Harvest Lane, where the business was carried on in the name of John Parkin; and that they were of a description usually required in such business. But the plaintiffs failed to shew that the defendants had any personal knowledge of the orders, or of the delivery of the goods.

6. It was proved that, after the execution of the deed, and at the time when the orders were given and the goods delivered, Parkin personally managed the business at the works in Harvest Lane bearing his name, and paid over all the moneys gained by the business to a banking-account kept for the purpose by the defendants; that the defendants met at the works weekly, when the books were submitted to them, and amongst others the order-book containing the counterfoils, many of which counterfoils were initialed by the defendant Bramall, though in no instance the orders themselves. Parkin informed the defendants of disbursements which would be required during the next ensuing week for the purpose of carrying on the business, and the defendants thereupon paid to Parkin in advance a sum of money sufficient to meet all such disbursements, and a further sum for wages and any additional requirements which came under the denomination of "petty-cash." Parkin had no authority given him from the defendants to pledge their personal credit.

7. The plaintiffs put the deed in evidence as part of their case.

8. The judge of the county-court held that the liability or non-

1870

EASTERBROOK v. BARKER.

liability of the defendants depended entirely on the construction to be put upon the deed.

9. For the plaintiffs it was contended that the relation of principals and agent, or masters and servant, was constituted between the defendants and Parkin; that the case of *Cox* v. *Hickman* (1) was an attempt to extend the doctrine of quasi partnerships by sharing profits (discussed in Lindley's Law of Partnership, 1st ed. 33, 40) to the creditors of a person executing a composition-deed, and therefore did not affect either the ground of liability in the present action or the persons sought to be made liable; that the deed was distinguishable from that in *Redpath* v. *Wigg* (2); and that the defendants were liable upon these contracts entered into in the manner and for the purposes set out in the case. They also referred to the Bankrupt Act of 1849 (12 & 13 Vict. c. 106), s. 150, and to the cases of *Price* v. *Groom* (3) and *Edmunds* v. *Bushell.* (4)

10. For the defendants it was contended that, in accordance with the principle laid down in *Cox* v. *Hickman* (1) and *Bullen* v. *Sharp* (5), and upon the authority of *Redpath* v. *Wigg* (2), the deed did not constitute them the masters or principals of Parkin so as to make them personally liable upon his contracts; and that the plaintiffs could only look for payment to Parkin himself and to the trusts in the deed for the payment of current expenses.

11. The learned judge held that the facts and the terms of the deed executed by Parkin differed in many essential particulars (which he pointed out) from the deed upon which the decision in *Redpath* v. *Wigg* (2) was founded; and that the effect and object of the present deed was to place the defendants in the position of the assignees of Parkin, rather than of mere inspectors,—quoting, to shew the position of such assignees, a passage from 1 Deacon B. L., 2nd ed. by De Gex, 346; that, at the time the orders were given, the defendants were the firm of "John Parkin;" and that, in the present case, all the elements were combined upon the absence of which Willes, J., relied very much in his judgment in *Redpath* v. *Wigg* (2): and upon the distinction on the facts and

(1) 9 C. B. (N.S.) 47; 30 L. J. (C.P.) 125; 8 H. L. 268.
(2) Law Rep. 1 Ex. 335.
(3) 2 Ex. at p. 548.
(4) Law Rep. 1 Q. B. 97.
(5) Law Rep. 1 C. P. 86.

1/ sc 2 Jur N S 804; 4 Jur N S 808; 7 Jur N S 105

1870

EASTERBROOK v. BARKER.

as to the provisions in the two deeds, he gave judgment for the plaintiffs for the amount claimed.

The question for the opinion of the Court was, whether the judge was right in holding that, upon the facts stated, the defendants were liable in point of law to pay for the goods in respect of which the action was brought.

June 6. *Jelf*, for the defendants. The deed did not constitute the trustees principals in the transaction; and, if it did, they were disclosed principals, and the plaintiffs elected to give credit to Parkin, the debtor, by whom the orders for the goods were given; and, further, assuming Parkin to have been acting as agent for the trustees, he was not entitled to pledge their credit, they having provided him with money to pay for the goods required for the purpose of carrying on the business. *Redpath* v. *Wigg* (1) is an authority for the first of these propositions; the only distinction between that case and the present being that here the deed contains an assignment of the property (but not of the business) to the trustees. That, however, does not alter the substantial character of the deed, the general scope of which was to secure to the creditors of Parkin the payment of the instalments of the composition, the trade being in the meantime carried on by Parkin under the inspection and control of the trustees, who were to supply him with the sums necessary to purchase such goods as were required, and to re-assign the premises to him with any surplus which might remain after paying the composition. There is nothing in the language of the deed to impose any liability upon the trustees; and, apart from the deed, it is clear that Parkin could have no authority to pledge their credit. In *Cox* v. *Hickman* (2) the creditors who were sought to be made liable for debts contracted by the trustees had a large interest in the business to be carried on by them, and the orders were given by one who was known as their agent. There was no attempt to make either the trustees or the creditors liable upon the deed alone.

Quain, Q.C., for the plaintiffs. The case is distinguishable from *Redpath* v. *Wigg* (1), on the ground that here the business was the business of the trustees at the time the goods were supplied.

(1) Law Rep. 1 Ex. 335.

(2) 9 C. B. (N.S.) 47; 30 L. J. (C.P.) 135; 8 H. L. 268.

1870

EASTERBROOK v. BARKER.

The defendants were trustees to carry on or wind up the business at their discretion. They were under no obligation to employ the debtor to carry it on: they were at liberty at any time to dismiss him and employ some one else. The true principle which must govern this case is that put by Lord Wensleydale in the House of Lords in *Cox* v. *Hickman* (1), where, after (2) saying that the question was, not whether the *trustees* were liable, but "whether this deed makes the creditors who sign it partners with the trustees, or, what is really the same thing, agents to bind them by acceptances on account of the business," he observes (3): "I think it is impossible to say that the authority to receive the debt, so secured, partly out of the existing assets, partly out of the trade, is such a participation of profits as to constitute the relation of principal and agent between the creditors and trustees. The trustees are certainly liable, because they actually contract by their undoubted agent; but the creditors are not, because the trustees are not their agents." So here, the trustees contract through the debtor, their agent. By the express terms of the deed, the debtor divests himself of all his property, subject to a possible reversion. The business being in reality the business of the trustees, they alone had the benefit of the goods supplied for the purpose of carrying it on. The case is, therefore, successfully distinguished from that put by Willes, J., as the governing principle in *Redpath* v. *Wigg* (4), where the object of the arrangement was to maintain the debtor in the same position that he had previously occupied, as the person principally interested in the business.

Jelf, in reply. The very form of the orders given would convey to the plaintiffs a direct intimation that the goods were required for the purposes of Parkin's trade. There was, at all events, enough to put the plaintiffs on inquiry. The whole object of the deed was to keep up Parkin's business for his ultimate benefit.

WILLES, J. The case is one of considerable importance, inasmuch as it may affect the construction of many similar deeds. We will therefore take time to consider our judgment.

Cur. adv. vult.

(1) 8 H. L. 268. (3) 8 H. L. at p. 314.
(2) 8 H. L. at p. 312. (4) Law Rep. 1 Ex. 340, 341.

1870

EASTERBROOK v. BARKER.

Nov. 10. The judgment of the Court (WILLES, MONTAGUE SMITH and BRETT, JJ.,) was delivered by

BRETT, J. This case came before the Court by way of appeal from a decision of the judge of the county-court of Yorkshire, sitting at Sheffield. The action was brought to recover the sum of 8*l.* 13*s.*, the amount of two orders for goods supplied to the defendant by the plaintiffs, who carried on business at Sheffield as machinists and engineers. The orders were in the following form:—

"Steel Works, Harvest Lane, Sheffield.

"Messrs. Easterbrook & Allcard, for John Parkin.

"4 ratchet braces, &c., &c.—W. M."

The orders were such as would be ordinarily given in the trade. John Parkin had carried on business in Harvest Lane as a manufacturer in steel. Being indebted to several creditors, and amongst others to the defendants, Barker & Bramall, the appellants, he had on the 19th of December, 1866, executed a deed, which was duly registered under the Bankruptcy Act, 1861, by which the defendants were appointed creditors' trustees. From the time of the execution of the deed up to and at the time the orders were given and the goods delivered, Parkin personally managed the business at the works in Harvest Lane bearing his name; but he paid over all the moneys gained by the business to a banking-account kept for the purpose by the defendants. The defendants met Parkin at the works weekly, when the books of the business were submitted to them, and amongst others the order-book, from which forms similar to those of the two orders in question were taken. Counterfoils remained, some of which were initialed by Bramall. Parkin informed the defendants of the disbursements which would be required during the ensuing week; and the defendants thereupon paid to Parkin in advance a sum of money sufficient to meet all such disbursements, wages, and petty-cash. Parkin had no authority given him from the defendants to pledge their personal credit. The plaintiffs failed to prove that the defendants had any personal knowledge of the orders in question or of the delivery of the goods. It did not appear that the plaintiffs had any knowledge of the deed or of the arrangements carried into effect under it.

1870

EASTERBROOK v. BARKER.

The deed purported to be made between John Parkin of one part, the defendants of another, and others the creditors of another; and it recited that, Parkin being unable to pay his debts in full, it had been agreed that he should pay to his creditors, in full discharge of their respective debts, 10*s.* in the pound, by instalments secured, and with provisions in case of default. The deed then contained a covenant by Parkin and Barker (but by Barker as a surety only) jointly and severally, to pay the first instalment of 2*s.* 6*d.* on the 1st of April, 1867, a similar covenant by Parkin and Bramall to pay the second instalment on the 1st of July, 1867, and a covenant by Parkin to pay the third and fourth instalments on the 1st of October, 1867, and 1st of January, 1868. The dividends were to be paid on such debts as would be provable in bankruptcy, and were to be secured respectively by promissory notes of the parties. The deed then contained a clause that, in further pursuance, &c., Parkin did grant and assign unto the defendants, their heirs, executors, and assigns, all and singular the lands and hereditaments, goods, chattels, credits, and other real and personal effects of him Parkin, with all and every the rights, members, and appurtenances thereto belonging or enjoyed therewith, except, &c., to have and to hold, &c., according to the nature and tenure of the same respectively. Parkin then appointed the defendants his attorneys to sue, &c. The deed then declared that the defendants, their executors, &c., should stand possessed of the premises, in trust, &c., and then set out a covenant by Parkin that he should and would, to the best of his skill and ability, forthwith carry on or proceed to wind up his said business according to the directions and under the superintendence of the defendants or the survivor of them, or any other person or persons who should be appointed in their place, and should during such time as the said business should be so carried on, and for the purpose of the carrying on thereof, authorize and permit the use of certain trade-marks, and should use his best endeavours, subject to the provisions of the deed, and in accordance with directions, &c., to obtain possession of and realize all the property and effects belonging to him, and should draw, accept, and indorse bills, &c., as required by the trustees, and that all moneys, bills, &c., accruing in respect of the said business, and its property, credits, and effects, should be deposited in a bank, &c., and the

trustees should prescribe the mode of keeping the accounts, &c., and Parkin should from time to time render accounts, &c., and should not during the continuance of the arrangement, without the consent in writing of the trustees, enter into any other business, and should, upon all matters and questions requiring the exercise of discretion, apply for the advice of, and should in all respects attend to and act upon such directions or suggestions as, the said trustees should give in relation to the carrying on or winding up of the said business, &c. There was then an agreement that the trustees, if they thought fit, might employ any person for effectuating the purposes of the deed, with salary, &c.; and also might draw and accept bills, &c., for the purpose of carrying on the business, and might make advances in respect of the said business; and that all moneys received by the trustees, &c., or realized, &c., should be applied, in the first place, in payment of the costs of the deed and negotiations, and in the next place to the payment of debts incurred in reference to the carrying on or winding up of the business, and of all advances made by the trustees, and in the next place to the payment to Parkin of such sums, if any, as the trustees should from time to time think fit to allow him as a remuneration for his trouble in carrying on or winding up the business; and the surplus was to be held in trust for Parkin, and was to be invested in the meantime. The deed then contained a proviso that the trustees might consult counsel on doubtful points, &c., and that they should be chargeable respectively only for such moneys, stocks, funds, and securities as they should respectively actually receive, and should be answerable only for their own acts, receipts, neglects, and defaults, and not for those of each other, nor for any banker, broker, &c., nor for any other loss unless the same should happen through their own wilful default respectively. And the deed then declared that, if the instalments should be duly paid, all the real and personal estate, surplus moneys, &c., should be re-transferred, and Parkin should thereupon be entitled to the same and to the said business for his own absolute use and benefit, discharged and released from the provisions of the deed. There was then a proviso that, if any instalments should be unpaid, the trustees should hold and realize the estate, upon trust to pay all expenses, advances, &c., including

1870

EASTERBROOK v. BARKER.

the debts incurred or to be incurred in reference to the carrying on or winding up the business, and then to pay all the creditors parties to the deed rateably, in full, &c. The deed then contained a declaration that it was intended to operate as an inspectorship and composition deed executed by a debtor under the Bankruptcy Act, 1861, and that all matters to which it related should be decided and determined according to the provisions of that Act and the laws of bankruptcy.

Upon these facts, the county-court judge held that the liability or non-liability of the defendants depended entirely upon the construction of the deed and the consequences of such construction. This part of his decision was not questioned before us. He also held that by the deed the defendants, the trustees, were more than mere inspectors over Parkin in his business,—that they were the assignees and owners of the business, so as to be at the time when the orders in question were given and fulfilled the firm of "John Parkin;" and that they were therefore liable to the plaintiffs.

On the argument before us it was contended, on behalf of the defendants, the appellants, that the deed did not constitute them principals in the transaction; that, if it did, they were disclosed principals, and the plaintiffs had elected to give credit to Parkin; and, further, though it did constitute them principals, and made Parkin their servant or agent, yet he was not entitled to pledge their credit, because they had provided him in advance with funds. On the part of the plaintiffs, it was argued that by the deed the business became the business of the defendants; that they might or might not employ Parkin as their servant or agent, at their pleasure; that they did employ him as their servant or agent to manage a known and recognised business; and that they were therefore liable in respect of his orders given in the ordinary course of such a business.

It is clear, then, that the primary question is whether, upon a true construction of the deed, the business remained still the business of Parkin, or became the business of the defendants. If it was still the business of Parkin, and was not the business of the defendants, no principle of law has been urged under or by which the defendants can be made liable in respect of orders given by Parkin. If it had been argued that the defendants were partners

with Parkin in his business, we should have been bound to apply to that question the rules or principles of law laid down in the House of Lords in *Cox* v. *Hickman* (1), as explained by the majority of the judges in the Exchequer Chamber in *Bullen* v. *Sharp*. (2) But, upon the point submitted to us, these cases seem not essentially applicable. In the present case, neither side argues that there was a partnership. The one side asserts that by the deed the defendants had become the owners of the business, and by their acts they had made Parkin their servant. The other side insists that by the deed Parkin remained still the owner of his business, and the defendants had no interest in it or control over it, other than as inspectors on behalf of the then-existing body of creditors. Such a question was raised, and determined in favour of the trustees, in the case of *Redpath* v. *Wigg* (3), from which the county-court judge held that the present case is to be distinguished in material particulars. But in that decision of the judge we cannot concur.

The Court of Exchequer Chamber, in *Redpath* v. *Wigg* (3), treated as the ultimate question this, whether the trustees were the masters or principals, and the debtor their servant or agent, or whether the debtor was master, and the trustees only inspectors and controllers. The test applied in order to solve that question was, the manifestation by the deed of the intention of the parties. The judgment was founded on this proposition, that the relation of master and servant exists or does not exist according to the intention of the parties. In order to determine what was the intention of the parties manifested by the deed, it was pointed out that, upon the payment of certain debts to be incurred and the agreed composition for existing debts, the business was to be the business of the debtor, free of all control; that, upon such payment, any then outstanding contract in favour of the business would enure to the advantage of the debtor, any outstanding debt to his disadvantage; and that the debtor's undertakings with regard to the business were all by way of covenants which if the debtor broke would subject him to actions for unliquidated damages.

(1) 8 H. L. 268. (2) Law Rep. 1 C. P. 86.
(3) Law Rep. 1 Ex. 335.

1870

EASTERBROOK v. BARKER.

So, in the present case, if we consider what was the intention of the parties to the deed, we find, first, that, although there is an assignment in terms of various species of existing property, there is no assignment in terms of the business; and the clause of re-assignment applies only to the other property, and not to the business; as to the business, there is a declaration. We find, further, a series of minute stipulations with regard to the business and the mode of carrying it on or relinquishing it, which would be wholly unnecessary if the business was to be transferred to the trustees as owners and masters of it; and we find a covenant by Parkin, not that he will serve the defendants as their servant or agent, but that he will carry on the business, that is, that he himself will carry on the business or wind it up, subject indeed to control, and subject particularly to this control, that he will attend to the directions and suggestions of the trustees. If Parkin should break this covenant, he would doubtless be liable to an action; but, construing a business document according to the ordinary habits and modes of dealing of business men, we think that this covenant very plainly shews that the true arrangement was simply this, that Parkin was to carry on the trade as his trade, subject to the inspection and control of the trustees. It is a wholly unusual covenant from servant to master. So is the agreement by the debtor that his supposed masters may employ other servants at salaries to be eventually charged against him.

As a further manifestation of the intention that the trustees were not to be masters or owners of the business, are the stipulations that they, the trustees, shall not be liable for the acts of each other, but each only for his own acts, and not for any default of his own other than a wilful default. Then there is the express declaration that the deed is only an inspectorship or composition deed, or, in other words, that it is not a deed of assignment of the business. And, again, the defendants, the trustees, are to receive no benefit or advantage from any act of theirs, or any successful prosecution of the business, other than their equal dividends in common with other creditors; but any greater success than is sufficient to meet the dividends, accrues at once to the benefit of the debtor.

It must strike every one conversant with business, we think,

1870

EASTERBROOK v. BARKER.

that, if the parties had intended to assign Parkin's business to the defendants as owners, though as trustees for creditors, and to make Parkin the mere servant or agent of the defendants, the form of assignment must, as a business transaction, have been greatly more simple.

Agreeing, then, that the question whether one man is acting as master and the other as servant, must be solved by the answer to the question what was the intention of the parties, which proposition we apprehend to be the foundation and real ground of the judgment in *Redpath* v. *Wigg* (1), and construing the present deed in accordance with what we apprehend to be the ordinary habits and modes of dealing of business men, we are of opinion that no such relation as that of master and servant or that of principal and agent was constituted by the deed in the present case between the defendants, the appellants, and Parkin. In fine, there was no liability in respect of an ostensible authority, for the plaintiff gave credit to Parkin; there was no liability in respect of authority in fact apart from the deed, for the deed was carried into effect according to its terms; and the deed did not create an authority to pledge the trustees' credit, for it only subjected him to their control as to how he should carry on the business as before upon his own resources, save in respect of advances made by them in their discretion; and it did not, as matters stood, make him their servant, subject to be discharged by them, so that they could have got rid of him and set up in business for themselves. It follows that the defendants are not liable in respect of the orders given by Parkin and executed by the plaintiffs.

The decision of the county-court must, therefore, be reversed, and judgment be for the defendants, with costs.

Judgment for the defendants.

Attorneys for plaintiffs: *Singleton & Tattershall.*

Attorneys for defendants: *Doyle & Edwards.*

(1) Law Rep. 1 Ex. 335. 12 Jur. N.S. 903.

[IN THE EXCHEQUER CHAMBER.]

1870
Nov. 30.

SMITH *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

Railway Company—Negligence—Fire from Engine—Remoteness of Damage.

Workmen employed by the defendants, a railway company, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there fourteen days during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps of trimmings and the hedge, and spread to a stubble-field beyond, and was thence carried by a high wind across the stubble-field and over a road, and burnt the plaintiff's cottage, which was situated about 200 yards from the place where the fire broke out. There was evidence that an engine belonging to the defendants had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine, nor was there any evidence that the fire began in the heaps of trimmings and not on the parched ground around them :—

Held, first, that it being a matter of common knowledge that engines do emit sparks, there was evidence for the jury that the fire originated in sparks from the engine that had just passed.

Secondly, that there was evidence for the jury that the defendants were negligent in leaving the dry trimmings, and that the trimmings either originated or increased the fire, and caused it to spread to the stubble-field.

Thirdly, that if the defendants were negligent they were responsible for the injury that resulted from their conduct to the plaintiff, although they could not have reasonably anticipated that such injury would be caused by it.

Appeal from a decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants or a nonsuit. (1)

This was an action for negligence, and the declaration contained three counts, of which the second and only material one was as follows :—

"That at the time of the committing by the defendants of the grievances in this count mentioned, the plaintiff was possessed of a cottage and premises, and the defendants were possessed of and had the care and management of a railway running near the said cottage and premises, with banks belonging thereto, and part of the said railway, and were possessed of locomotive engines containing burning substances, which were used by the defendants for conveying

(1) Law Rep. 5 C. P. 98.

1870

SMITH v. LONDON AND SOUTH WESTERN RAILWAY CO.

carriages along this railway. Yet, by the negligence and improper conduct of the defendants, and the want of due care on the part of the defendants in the keeping and management of their said railway engines and banks, quantities of cut grass and hedge trimmings were heaped up on the said railway and banks, and became and were ignited, and a fire was occasioned which spread over and along a stubble field, near the said railway, unto the said cottage and premises, and set fire to the same, and thereby the same and the plaintiff's furniture, &c., then being in and near the said cottage and premises, were burnt and destroyed, and the plaintiff lost the use and enjoyment of the same."

The defendants pleaded not guilty, and issue was joined thereon.

The case was tried before Keating, J., at the summer assizes, 1869, held at Dorchester, when evidence was given for the plaintiff which was in substance as follows:—

It was proved that the defendants' railway passed near the plaintiff's cottage, and that a small strip of grass extended for a few feet on each side of the line, and was bounded by a hedge which formed the boundary of the defendants' land; beyond the hedge was a stubble-field, bounded on one side by a road, beyond which was the plaintiff's cottage. About a fortnight before the fire the defendants' servants had trimmed the hedge and cut the grass, and left the trimmings and cut grass along the strip of grass. On the morning of the fire the company's servants had raked the trimmings and cut-grass into small heaps. The summer had been exceedingly dry, and there had been many fires about in consequence. On the day in question, shortly after two trains had passed the spot, a fire was discovered upon the strip of grass land forming part of the defendants' property; the fire spread to the hedge and burnt through it, and caught the stubble-field, and, a strong wind blowing at the time, the flames ran across the field for 200 yards, crossed the road, and set fire to and burnt the plaintiff's cottage. There was no evidence that the defendants' engines were improperly constructed or worked; there was no evidence except the fact that the engines had recently passed, to shew that the fire originated from them. There was no evidence whether the fire originated in one of the heaps of trimmings or on some other part

1870

SMITH v. LONDON AND SOUTH WESTERN RAILWAY CO.

of the grass by the side of the line; but it was proved that several of the heaps were burnt by the fire. Two of the company's servants were proved to have been close to the spot when the fire broke out, and to have given the alarm, but they were not called by either side.

At the close of the plaintiff's case the counsel for the defendants submitted that there was no case to go to the jury. At the suggestion of the judge, and by consent, a verdict was taken for the plaintiff for 30*l.*, subject to leave reserved to the defendants to move to set it aside, and instead thereof to enter a verdict for them, on the ground that there was no evidence to go to the jury of any liability on the part of the defendants. The Court to be at liberty to draw inferences and to amend the pleadings.

The defendants applied for and obtained a rule pursuant to the leave reserved, which, after argument, was discharged (1), and from the judgment so given discharging the rule the present appeal was brought.

Kingdon, Q.C. (*Murch* with him), for the defendants. There is no evidence that the trimmings were the cause of the fire. It was proved that they were partially consumed by it, but not that it originated in them. Nor was there any evidence that the fire was caused by sparks coming from the engine. There were many other ways in which it may have begun which are equally consistent with the evidence. Thus, a fusee may have been thrown from a window of one of the carriages of the train, or one of their workmen on the line may have dropped a spark from his pipe. Where the evidence is equally consistent with the view that the defendants were liable, and that they were not, there is no evidence to go to the jury.

[CHANNELL, B. But here the two causes of the fire that are suggested, viz., the engine and the pipe or cigar, are not of equal probability, and there was evidence for the jury, therefore, that the fire was caused by the more probable of the two alleged causes.]

The company would not be responsible for the sparks unless they acted negligently. The spark may have set fire to the dry grass, and then spread to the trimmings; and if the banks were

(1) Law Rep. 5 C. P. 98.

1870

SMITH v. LONDON AND SOUTH WESTERN RAILWAY CO.

properly kept, the fire would not, in that view, have been caused by the defendants' negligence, nor would the defendants be responsible.

[BLACKBURN, J. I understand Keating, J., to say that the trimmings increased the fierceness of the fire, if they did not originate it, and so made it spread.]

There is nothing in the evidence to shew what was the character of the fire before it got into the stubble-field.

[KELLY, C.B. Surely it would be for the jury to say whether it was more probable that the trimmings or the grass first ignited?]

Even if there be evidence that the heaps of trimmings contributed to the fire, there is no evidence that they contributed to the final result. The defendants are not answerable for any exceptional state of circumstances which they could not reasonably expect. In *Blyth* v. *Birmingham Waterworks Company* (1), Bramwell, B., said: "It would be monstrous to hold the company liable for negligence because they did not forsee an event that was so remote from probability that for many months it could not be found out what was the cause of the injury to the plaintiff's premises." The same was held in *Cornman* v. *Eastern Counties Ry. Co.* (2) Here it was impossible that the defendants could foresee that the fire would spread so far and across a public highway to the plaintiff's premises, and they cannot, therefore, be liable. This was the view taken by Brett, J., in the court below.

[BLACKBURN, J. In *Fletcher* v. *Rylands* (3) the House of Lords held that the defendants were responsible for the injury caused, though no one could have reasonably anticipated it.]

Cole, Q.C. (*Bere, Q.C.*, with him), for the plaintiff. The season when this fire occurred had been a very dry one, and it was the duty of the defendants to take special care of their banks. Probably for that reason they did send men to cut the rummage, as it was called, and trim the hedges; but, instead of taking it away, they left the litter all along the line for a fortnight to get dryer, and on the day in question it had been raked together in small heaps. It was clearly negligent, under the circumstances, to leave such inflammable matter lying all along the line. The second

(1) 11 Ex. 781, 785; 25 L. J. (Ex.) 212, 214.
(2) 4 H. & N. 781; 29 L. J. (Ex.) 94.
(3) Law Rep. 3 H. L. 330.

1870

SMITH v. LONDON AND SOUTH WESTERN RAILWAY CO.

count in *Vaughan* v. *Taff Vale Ry. Co.* (1) was very similar to that in this action, and was, in effect, upheld by the Exchequer Chamber, who ordered a new trial on the ground that it had never been properly left to the jury, and in *Freemantle* v. *London and North Western Ry. Co.* (2) Willes, J., said, "In *Vaughan* v. *Taff Vale Ry. Co.* (3) the parties afterwards came before me at chambers, and I made an order by consent, staying the proceedings on payment of the damages and costs. The company in that case had allowed the embankment of their railway to be in such a state as to become peculiarly liable to ignite from anything that might fall from an engine." Even if the trimmings were not the origin of the fire, it would have spread but slowly without them, and would have been put out by the company's servants, who were proved to have been at hand. In *Blyth* v. *Birmingham Waterworks Company* (4) the defendants had done all that they were bound to do by their Act of Parliament, and the accident was caused by ice getting under the plugs, which, as Bramwell, B., said, it was no more their duty than that of the plaintiff to remove. The judgment of Brett, J., in the court below is to a great extent in favour of the plaintiff. He admits that if the cottage had been near the railway the defendants would have been liable; but, if so, it must, at least, have been a question for the jury whether the circumstances were such that the defendants could not have reasonably expected this injury to have occurred. If a man lights a fire on his own land, and it extends to that of another, and does injury, he is responsible for it: *Vaughan* v. *Menlove* (5): that was also laid down in *Tubervil* v. *Stamp* (6); and though it is there said he will not be responsible if the fire is carried to the property of another by a sudden storm, that refers to a storm of a wholly exceptional, unexpected character, and not to a high wind only: see *Jones* v. *Festiniog Ry. Co.* (7)

Kingdon, Q.C., in reply. The case that has gone farthest in favour of the plaintiff on the question of remoteness of damage is

(1) 3 H. & N. 743; 28 L. J. (Ex.) 41; in error, 5 H. & N. 679; 29 L. J. (Ex.) 247.
(2) 10 C. B. (N.S.) at p. 96; 31 L. J. (C.P.) 12.
(3) 5 H. & N. 679; 29 L. J. (Ex.) 247.
(4) 11 Ex. 781; 25 L. J. (Ex.) 212.
(5) 3 Bing. N. C. 468.
(6) 1 Salk. 13.
(7) Law Rep. 3 Q. B. 733, 735.

Vaughan v. *Menlove* (1), and there the land was that of a neighbour, and the case is explained by Bramwell, B., in *Blyth* v. *Birmingham Waterworks Company* (2), who says that the defendant in that case had been expressly warned of the danger that his conduct was causing. The doctrine of the remoteness of damage is founded on common sense. There must be a limit placed somewhere to persons' liability.

KELLY, C.B. I certainly entertained some doubts during the argument as to whether the judgment of the Court below could be sustained; but when I consider the facts, I cannot but feel that it is a case in which there was some evidence of negligence on the part of the defendants, and negligence which caused the injury complained of. It appears that about the time that the spot in question was passed by an engine which, as we know, would emit sparks which would fall on the adjoining ground, a fire was discovered on the defendants' ground adjoining the line. It appears that it had been a dry summer, and the hot weather had continued for many weeks before the occurrence; and probably with a view to prevent mischief, the defendants had caused the grass that grew by the line and the fence to be cut, and the cuttings of the grass and hedge were placed in small heaps on the ground between the rails and the hedge. On the other side of the hedge was a stubble field of considerable extent which would be extremely dry, and at a distance of two hundred yards across a road was the cottage belonging to the plaintiff. This was the state of facts. The trimmings caught fire, there was a strong south-east wind blowing; and though we have no proof of the exact progress of the fire, because the company's servants who had seen it were not called, it appears to have extended to and through the hedge and across the field to the plaintiff's cottage which was burnt. The question for us is, how all this occurred. There is some doubt how the fire originated, but there was ample evidence for the jury, which would have been rightly left to them, that it originated from sparks from the engine falling on the dry heaps of trimmings, and thence extending to the hedge and stubble-field. If that was so, the question arises whether there was any negligence in the defendants.

(1) 3 Bing. N. C. 468.

(2) 11 Ex. 781, 784; 25 L. J. (Ex.) 212.

C 2

1870

SMITH v. LONDON AND SOUTH WESTERN RAILWAY CO.

Now it can scarcely be doubted that the defendants were bound in such a summer, knowing that trains were passing from which sparks might fall upon them, to remove these heaps of trimmings; and, at any rate, it was a question for the jury whether it was not negligent of them not to do so. I think, therefore, there was a case for the jury on which they might reasonably have found that the defendants were negligent in not removing the trimmings as soon as possible, and that this was the cause of the injury. Then comes the question raised by Brett, J., to which at first I was inclined to give some weight. He puts it thus: "I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding that they were of the best construction, and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man would have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at the distance of 200 yards from the railway, crossing a road in its passage." It is because I thought, and still think, the proposition is true that any reasonable man might well have failed to anticipate such a concurrence of circumstances as is here described that I felt pressed at first by this view of the question; but on consideration I do not feel that that is a true test of the liability of the defendants in this case. It may be that they did not anticipate, and were not bound to anticipate, that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for all the consequences of their conduct, and that the mere fact of the distance of this cottage from the point where the fire broke out does not affect their liability, and that the judgment of the Court below must be affirmed.

1870

SMITH v. LONDON AND SOUTH WESTERN RAILWAY CO.

MARTIN, B. I am of the same opinion. The only question we have to decide is, whether there was any evidence for the jury of negligence on the part of defendants which caused the injury complained of. The facts are, that the plaintiff had a cottage near the railway, and that he was perfectly innocent of anything that could conduce to his loss, and that he had his house burned down. The question is, did the fire come there from any negligent act of the defendants? I think there is evidence that it did. There was evidence of the trimmings being improperly left by the defendants by the side of their line, and that a spark from a passing engine fell on them and caused the fire, which was thus due to the defendants' negligence.

BRAMWELL, B., concurred.

CHANNELL, B. I am of the same opinion. I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by Bramwell, B., in his judgment in *Blyth* v. *Birmingham Waterworks Co.* (1), referred to by Mr. Kingdon; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

BLACKBURN, J. I also agree that what the defendants might reasonably anticipate is, as my Brother Channell has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence. I have still some doubts whether there was any evidence that they were negligent, but as all the other judges are of opinion that there was evidence that they were, I am quite content that the judgment of the Court below should be affirmed. I do not dissent, but I have some doubt, and will state from what my doubt arises. I take it that, since the case of *Vaughan* v. *Taff Vale Ry. Co.* (2), which was expressly affirmed in *Brand* v. *Hammersmith Ry. Co.* (3), it is clear that when a railway

(1) 11 Ex. 781; 25 L. J. (Ex.) 212.

(2) 5 H. & N. 679; 29 L. J. (Ex.) 247.

(3) Law Rep. 4 H. L. 171.

1870

SMITH v. LONDON AND SOUTH WESTERN RAILWAY CO.

company is authorized by their Act of parliament to run engines on their line, and that cannot be done without their emitting sparks, the company are not responsible for injuries arising therefrom, unless there is some evidence of negligence on their part. That being so, I agree that if they have the land at the edge of the line in their own occupation they ought to take all reasonable care that nothing is suffered to remain there which would increase the danger. Then comes the question, is there evidence enough in this case of a want of that reasonable care? It can hardly be negligent not to provide against that which no one would anticipate. I have no doubt that if the company strewed anything very inflammable, such as, to put an extreme case, petroleum along the side of their line, they would be guilty of negligence. The reasoning for the plaintiff is that the dry trimmings were of an inflammable character and likely to catch fire. My doubt is, whether, since the trimmings were on the verge of the railway on the company's land, if the quickset hedge had been in its ordinary state, they might not have burned only on the company's premises, and done no further harm, and whether the injury, therefore, was not really caused by the hedge being dry, so that it caught fire, and by the fire thus spreading to the stubble-field, and thence to the plaintiff's cottage. I think it is clear that when the company were planning the railway they could not expect that the hedge would become so dry, and therefore were not negligent in putting a hedge instead of a stone wall; and though the drought had lasted some weeks, I can hardly think it was negligent in them not to remove the hedge. I do not say that there is not much in what is said with respect to the trimmings being the cause of the injury, and not the state of the hedge, but I doubt on this point, and, therefore, doubt if there was evidence of negligence; if the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots, which shews that what a person may reasonably anticipate is important in considering whether he has been negligent; but if a person

fires across a road when it is dangerous to do so and kills a man who is in the receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a labourer.

PIGOTT, B. I am of the same opinion. I had some doubts at first, but in the result I am of the same opinion as is expressed by Keating, J., in his judgment in the court below. He says that he was pressed with the consideration that leaving some very inflammable substance along the side of the line where trains were frequently passing was some evidence of negligence. It comes to this, that in a dry summer, with a knowledge of the risk of fire which must be caused, the defendants left heaps of combustible matter along the side of their line; then whether the fire did arise from those heaps was a question for the jury, and it seems clear that it either came from, or was at any rate increased by, the heaps, and so got through the fence to the field, and when once in the field there was no way to stop it till it burned the plaintiff's cottage, and this, as it seems to me, was nothing but what a reasonable man might have anticipated.

LUSH, J. I am also of opinion that there was evidence from which a jury might properly conclude that the fire originated from the sparks falling from the engine, and that the heaps added to its intensity, and thus caused it to burn the hedge and stubble; and I confess it seems to me that the more likely the hedge was to take fire, the more incumbent it was upon the company to take care that no inflammable material remained near to it.

Judgment affirmed.

Attorneys for plaintiff: *Sole, Turner, & Turner, for W. C. Lacy, Wareham.*

Attorney for defendants: *Lewis Crombie.*

1870
Nov. 16.

MURRAY *v.* CURRIE.

Master and Servant—Negligence of Servant—Test of Liability of Master.

The defendant employed a stevedore to unload his vessel. The stevedore employed his own labourers, amongst whom was the plaintiff, and also one of the defendant's crew, named Davis, whom he paid and over whom he had entire control, to assist them, in unloading. The plaintiff, while engaged in the work, was injured through the negligence of Davis: —

Held, that the defendant was not responsible for the injury.

The declaration stated that the defendant, by his servants and workmen, being engaged in the unloading of a vessel in or near a public dock in Liverpool, by his said servants and workmen so negligently and improperly conducted himself about the premises that by means thereof certain machinery or cog-wheels were set in motion, whereby the hand of the plaintiff, who was lawfully upon the ship, was drawn in between the said cog-wheels and crushed and injured, &c.

Pleas, first, not guilty; secondly, a denial that the defendant by his servants and workmen was engaged in unloading the ship. Issue thereon.

The cause was tried before the assessor of the Passage Court, Liverpool, on the 20th of July last. The defendant, it appeared, was the owner of the steam-ship *Sutherland*, which at the time of the accident in question was alongside a quay in the Nelson Dock. For the purpose of facilitating the loading and unloading of cargo the vessel was provided with a winch at each of her four hatchways, worked by a donkey-engine. On the 15th of January last, whilst the plaintiff, who was a dock-labourer, was engaged together with one Davis, one of the *Sutherland's* crew, in unloading the vessel by means of one of the winches, his hand was, through the negligence of Davis, jammed between the cog-wheel and pinion, and much injured. The work of unloading the vessel was being done by one Kennedy, a master stevedore; and all the men engaged in it were under his direction and control.

Kennedy, who was called for the defendant, stated that he supplied the labour for the unloading and the working of the steam-engine; that Davis worked the winch, and was fully competent: that the office [i. e. the defendant] paid him, but deducted the sum

paid from his (Kennedy's) bills; that all the unloading was under his control and that of his foreman; that he would have had to get labour elsewhere, if the ship had not found men; that the ship-owner selected those of the crew who were employed in unloading, but he (Kennedy) selected the work for them, and had control over it; and that he could have refused to employ Davis or any man whom he thought incompetent.

The verdict was by consent entered for the plaintiff, damages 50*l.*, with leave to the defendant to move to enter a verdict for him if the Court should be of opinion that the defendant was not under the circumstances liable for the negligence of Davis,—the Court to be at liberty to draw inferences of fact.

C. Russell obtained a rule nisi, citing *Murphey* v. *Caralli.* (1)

Herschell shewed cause. Davis was the servant of the defendant, and not of Kennedy, the stevedore, and the defendant was therefore responsible for his negligence. The fact that Davis was at the time of the accident acting under the direction of the stevedore makes no difference.

[BOVILL, C.J. The question is, who was working the winch,—the defendant or Kennedy?

BRETT, J. If Davis by his negligence had damaged part of the cargo, would not Kennedy have been liable to the owner?]

It is submitted that he would not. The true test is, whose servant was Davis, not under whose immediate orders he was working; or, as Crompton, J., says in *Sadler* v. *Henlock* (2), cited in *Warburton* v. *Great Western Railway Co.* (3), "The test is, whether the defendant retained the power of controlling the work."

[BRETT, J. How do you meet the case of *Murphey* v. *Caralli* (1) cited by Mr. Russell on moving?]

There the work was being done under the control and superintendence of the warehousekeeper, and for his benefit; the persons through whose negligence the injury was caused were not in any sense acting as the servants or in pursuance of orders of the defendant. The case is so put by Bramwell, B., in his judgment.

(1) 3 H. & C. 462; 34 L. J. (Ex.) 14. 10 Jur. N.S. 1207.

(2) 4 E. & B. 570, 578; 24 L. J. (Q.B.) 138, 141. (3) Law Rep. 2 Ex. 30. 1 Jur. N.S. 677

1870

MURRAY v. CURRIE.

C. Russell, contrà, was not called upon.

BOVILL, C.J. Mr. Herschell has put the case very clearly before us; but his argument has failed to carry conviction to my mind. Kennedy, the stevedore, undertook to execute the work of unloading the *Sutherland*, and for that purpose a steam-winch belonging to the ship was placed at his disposal. The work of unloading was done by Kennedy under a special contract. He was acting on his own behalf, and did not in any sense stand in the relation of servant to the defendant. He had entire control over the work, and employed such persons as he thought proper to act under him. He had the option of using the services of the crew of the ship; but he was under no obligation to do so. Whether he selected independent labourers or part of the crew, they were all his servants, and their acts were his acts, and not the acts of the owner. The owner did not exercise any control over the work. All was left to the stevedore and those whom he employed. The stevedore paid for the labour he engaged, making an allowance to the owner of the vessel for the pay of those of the crew who assisted in the work. Davis was employed in this way by the stevedore, and was doing his work, and under his control and superintendence. In no sense, therefore, can it be said that Davis was working for or under the orders of the defendant, so as to make the maxim "Respondeat superior" apply. The defendant did not stand in the relation of superior. The rule must be made absolute to enter a nonsuit.

WILLES, J. I am of the same opinion. It is to be observed that this is not a question arising between ship-owner and charterer. The employment of stevedores has grown out of the duty of the owner to load and unload the ship. This duty used formerly to be executed by the crew; but, in dealing with large cargoes, the exigencies of modern commerce have created a necessity for the employment of persons skilled in the particular work of stowing cargo. The stevedores, however, are not the servants of the owner of the ship; but they are persons having a special employment, with entire control over the men employed in the work of loading and unloading. They are altogether independent of the

master or owner. In one sense, indeed, they may be said to be agents of the owner; but they are not in any sense his servants. They are not put in his place to do an act which he intended to do for himself. I apprehend it to be a clear rule, in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back, and make the employer of that person liable. The question here is, whether Davis, who caused the accident, was employed at the time in doing Kennedy's work or the ship-owner's. It is possible that he might have been the servant of both; but the facts here seem to me to negative that. The rule, out of which this case forms an exception, that a servant or workman has no remedy against his employer for an injury sustained in his employ through the negligence of a fellow-servant or workman, is subordinate to another rule, and does not come into operation until a preliminary condition is fulfilled: it must be shewn that, if the injury had been done to a stranger, he would have had a remedy against the person who employed the wrong-doer. Here, I apprehend, the defendant would not have been liable to the charterer if the wrongful act of Davis had caused damage to any part of the cargo; and for this simple reason, that the person doing the work in the performance of which the damage was done was not doing it as his servant. He was acting altogether independent of his control. The defendant could not have taken him away from the work. It was Kennedy's work that he was employed upon, and under Kennedy's control. The liability of a master for the acts of his servant extends only to such acts of the servant as are done by him in the course of the master's service. The master is not liable for acts done by the servant out of the scope of his duty, even though the master may have entered into a bargain that his servant should be employed by another, and is paid for such service, as was done here. It seems to me to be quite plain that the defendant incurred no liability for the act of Davis.

MONTAGUE SMITH, J. I am of the same opinion. Applying all the usual tests, the defendant was not the master of Davis in doing the work in the course of which the injury was received by

1870

MURRAY v. CURRIE.

the plaintiff. He was not the immediate principal of Davis, but Kennedy, who was an independent contractor as stevedore to unload the vessel, was. In order to perform his contract, it was necessary for Kennedy to employ a number of labourers. He selected them. Some of them were persons unconnected with the ship. Others were part of the crew of the vessel, employed at the request or upon the recommendation of the defendant or the master. But, though he employed them upon that recommendation, it was competent to Kennedy to reject their services. It follows, therefore, not only that Kennedy was the immediate principal for whom the work was done, but also that he was the employer of Davis, and the entire controller of the labour of those whom he employed. An ambiguity was sought to be raised from the circumstance of Davis being one of the crew; but he was employed under an arrangement by which his wages for the time were to be ultimately paid by Kennedy. I entirely agree with the rest of the Court that Davis was the servant of Kennedy and not of the defendant, and was subject only to Kennedy's orders, and consequently that the defendant is not liable.

BRETT, J. The ordinary contract and liability of a stevedore is well established; and the only question here is whether there was anything in the evidence to take the case out of the ordinary rule. The only circumstance relied on for that purpose is that the defendant placed the services of Davis at the disposal of the stevedore. But I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor.

Rule absolute.

Attorneys for plaintiff: *Cree & Last, for Barrell & Rodway, Liverpool.*

Attorneys for defendant: *Field, Roscoe, & Co.*

BOCKING, APPELLANT; JONES, RESPONDENT. 1870 *Nov.* 21.

Hackney Carriages—Rate of Charge—Flag—Licensing under 32 & 33 *Vict. c.* 115—*Order of Secretary of State.*

The Metropolitan Public Carriage Act, 1869, impowers the home secretary to license hackney-carriages in such manner and in such form and subject to such conditions as he may by order prescribe; and also to make regulations for (amongst other things) fixing the rates of fares and for securing the due publication thereof.

In pursuance of the power thus conferred upon him, the home secretary made an order prescribing a form of licence, which was to contain the rate to be charged for the hire of each carriage per mile and per hour. The order further required that the application for a licence should specify the sums which the applicant desired to have inserted in the licence as the rates at which the carriage should ply for hire; that the carriage should be inspected prior to the licence being issued; and that, before plying for hire, the proprietor should affix to the top of the carriage a metal flag with the rates to be charged in accordance with his licence. Penalties were imposed by the Act for breach of the order.

Upon a summons against the proprietor of a hackney-carriage for non-compliance with the order in respect of the affixing a flag with the fares, the magistrate refused to convict the defendant, on the ground that the order was not a sufficient compliance with the Act; inasmuch as the secretary of state had no power to authorize an indefinite number of scales of charge for hackney-carriages, but only one scale binding upon all hirers and all proprietors:—

The Court (Brett, J., doubting,) reversed his decision.

CASE stated by a Metropolitan police-magistrate under 20 & 21 Vict. c. 43.

The appellant, an inspector of police, summoned the respondent for suffering a hackney-carriage to ply for hire without having furnished and affixed to the top thereof a metal flag with the fares of such carriage painted thereon. The appellant contended that this was a breach of clause 20 of the order made by the Home Secretary on the 1st of February, 1870, in pursuance of the Metropolitan Public Carriage Act, 1869, 32 & 33 Vict. c. 115, which order was to be deemed part of the case. The material provisions of the order were as follows:—

"2. Hackney-carriage licences to be granted under the said Act shall be in the form contained in schedule A. to this order." At the foot of the form there given are these words,—"And I certify with regard to the said carriage that the number of persons which it is licensed to carry is —— inside, and —— outside [the num-

1870

BOCKING v. JONES.

bers respectively given in the certificate of the inspector of public carriages], and that the rates to be charged are as follows, namely, rate per mile ——; rate per hour ——."

"3. Hackney-carriage licences shall be granted by the commissioner of police of the metropolis," &c.

"4. The application for a hackney-carriage licence shall specify, among other particulars, the sums which the applicant desires to have inserted in the licence as the rates at which the hackney-carriage to which the licence if granted will relate shall ply for hire by distance and by time respectively," &c.

"6. Before the licence is issued, the public carriage shall be brought to the police-station of the district, and examined by the inspector of public carriages. The said inspector, if he shall find the same to be fit for public use, shall cause a metal plate, bearing the number which is to distinguish such public carriage, to be fixed thereto in his presence, and shall sign a certificate stating that such public carriage has been examined by him and found fit for public use, and specifying the number of persons which the said public carriage should be licensed to carry, and the number of the plate which has been affixed thereto," &c.

"20. Before a licensed hackney-carriage may ply for hire in pursuance of a licence,—(1) The proprietor shall cause to be painted at the back of the hackney-carriage, on the outside, the number of persons which the hackney-carriage is licensed to carry: (2) The proprietor shall furnish and affix to the top of the hackney-carriage, in a socket or by a hinge, as may be directed by the commissioner of police of the metropolis, a metal flag, and on such metal flag he shall cause to be distinctly painted in black letters upon a white ground, or in white letters upon a black ground, the rate per mile and the rate per hour to be charged in accordance with his licence. If the proprietor suffers his hackney-carriage to ply for hire before he has fulfilled both these provisions, he shall be deemed to have committed a breach of this order."

"26. The proprietor of a hackney-carriage shall provide for the driver, and the driver shall deliver to the hirer on entering the same, a ticket of the following form:"—[containing on one side the number and the name and address of the proprietor, and on the other the rates of charge for time and distance, for luggage,

&c., which are to correspond with the rates mentioned in the licence.] "If the driver neglect or refuse to deliver such ticket in manner aforesaid, he shall be deemed to have committed a breach of this order."

"28. If at any time the rates exhibited on the flag of a hackney-carriage plying for hire be at variance with the rates specified in the licence, the proprietor shall be deemed to have committed a breach of this order."

"44. A penalty not exceeding 40*s.* is hereby annexed for any act or default which is a breach of this order, save only in those cases where a higher penalty may lawfully be enforced for the same act or default as an offence under the provisions of any other Act of parliament now in force."

The magistrate dismissed the summons; and, in stating a case for the opinion of the Court under 20 & 21 Vict. c. 43, after referring to s. 9 of 32 & 33 Vict. c. 115, which impowers the secretary of state from time to time to make regulations for the purpose, amongst others, of fixing the stands of hackney-carriages, the distances to which they may be compelled to take passengers, and the rates or fares as well for time as distance, delivered his opinion as follows:—

"It appears to me that, bearing in mind all existing acts upon this subject, the legislature intended the secretary of state to be the arbiter between the public and the proprietors of hackney-carriages for these purposes, and that it is his duty to determine where the stand shall be, what the compulsory distance shall be, and what is the fair scale of charges to be paid by the hirer. He has done so with respect to the stands and the compulsory distance: but, with respect to fares, he has allowed each proprietor to propose for himself a scale of charges subject to confirmation by the secretary of state, thereby creating an indefinite number of fares, and ignoring altogether the interests and rights of the hirer; for, I consider that the hirer is entitled to know and to pay only what the secretary considers to be a proper remuneration to the proprietor, and it is evident that what is proper for one proprietor is proper for all.

"Now, if the secretary of state can authorize an indefinite number of fares with the consent of the proprietors, there is

1870

BOCKING v. JONES.

nothing in the Act to prevent his doing the same without their consent, and nothing to prevent his making similar regulations as to stands and distances; so that he might arbitrarily assign to different proprietors the use of certain stands only, and compel them to carry passengers different distances and for different fares, —a construction of the Act which seems to involve its own condemnation.

"It was certainly not intended to give the secretary of state an unlimited discretion, because the 9th section fixes a minimum scale of fares and a maximum compulsory distance; but these enactments would little avail the proprietors if they are to be subject to such capricious regulations as those just specified. It might reasonably be expected that such a power as that contended for, being at variance with all previous legislation which is now exercised, is so vexatious to the hirer, and which might be made so oppressive to the proprietor, would be enacted in express terms, and guarded against abuse by stringent restrictions.

"The Act clearly points to fixed fares: but it is difficult to see in what sense the fares can be called fixed so far as the public are concerned, for, not only may they be different for each vehicle, but the proprietor, by giving fourteen days' notice, may continually vary them. To this may be added that the facilities for cheating the public are greatly multiplied; since the driver, by having a second set of cards and flag with higher rates than those contained in the licence for his carriage, may with impunity defraud the hirer by using them on all occasions when carriages are in request. I use the words 'with impunity' advisedly, because the detection and punishment of the fraud would cost so much time and trouble as to make the redress worse than the imposition."

The opinion of the Court was requested whether under the Act the secretary of state has power to authorize an indefinite number of scales of charge for hackney-carriages, instead of one scale binding upon all hirers and all proprietors.

Archibald (*Sir R. P. Collier, A.G.*, with him), for the appellant. The order of the secretary of state referred to in the case is a proper compliance with the statute, and the respondent ought to have been convicted. The intention of the statute, as stated in sec-

tions 6 and 9 (1), was, that the fares of hackney-carriages should be fixed with reference to the quality and amount of the accommodation afforded to the public; and that object is well carried out by the 4th and 20th clauses of the secretary of state's order. The licence is to be granted on such conditions as the secretary may prescribe; and by the operation of the order, combined with the terms of the licence, the amount of the fare is sufficiently ascertained. Id certum est quod certum reddi potest.

The respondent did not appear.

BOVILL, C.J. I am of opinion that the order of the secretary of state referred to in this case is valid, so far as its validity is raised before us on this occasion, and that the magistrate ought to have convicted the respondent. Under former statutes the fares were fixed by parliament. (2) Under 32 & 33 Vict. c. 115, the fares are to be fixed by the secretary of state. The statute does not say that there shall be one uniform scale of fares. Sect. 9 enacts that the secretary of state may from time to time by order make regulations for (amongst other things) fixing the rates of fares, and for securing the due publication of such fares. The mode he has adopted is this. Persons desirous of obtaining licences are to state in their application the sums which they desire to have inserted in the licence as the rates at which the carriage is to ply for hire, by distance and by time respectively. The carriage is to be brought to the police-station and examined by the inspector of public carriages. If approved of by him, a licence may be granted

(1) Sect. 6 of 32 & 33 Vict. c. 115, enacts that "One of Her Majesty's principal secretaries of state may from time to time license to ply for hire within the limits of this Act hackney and stage-carriages, to be distinguished in such manner as he may by order prescribe. Any licence in respect of a hackney or stage-carriage under this section may be granted at such price, on such conditions, be in such form, &c., as the secretary of state may by order prescribe," &c.

Sect. 9. "The secretary of state may from time to time by order make regulations for" (amongst other things) "fixing the rates or fares, as well for time as distance, to be paid for hackney-carriages, and for securing the due publication of such fares: provided that it shall not be made compulsory on the driver of any hackney-carriage to take passengers at a less fare than the fare payable at the time of the passing of this Act. . . . Subject to the following restrictions: (2) No hackney-carriage shall be compelled to take any passenger a greater distance for any one drive than six miles."

(2) See 16 & 17 Vict. cc. 33, 127.

1870

BOCKING v. JONES.

on production of his certificate. The form of the licence is found in schedule A., referred to in the 2nd clause of the order. Each licence has a distinguishing number; and the rates to be charged per mile and per hour are therein stated. The magistrate supposes that, unless the secretary of state by the order himself fixes the amount of charge, there may be an indefinite number of fares authorized, to the great inconvenience of the public. But the commissioner of police will take care to have some uniformity in the arrangement. It would be impossible for the secretary of state to fix one uniform rate of charge in one order, unless there was one uniform style of carriage. The very object of the legislature was to have a more convenient and more sightly description of public conveyances. I cannot see that any hardship or inconvenience is imposed upon the public by the way in which that object has been carried out. The commissioner and inspector must receive credit for not exercising their functions in an arbitrary or capricious manner: and the order provides abundant means to secure to the public a knowledge of the fares which they are to pay. Further, by the 26th clause of the order the driver is to deliver a card or ticket which will inform the passenger of the rates authorized by the licence to be charged. If, therefore, the object of the legislature be that the hirer shall know with certainty what the proper fare is, it seems to me that this order sufficiently carries out that object. I do not agree with the magistrate in thinking that any facility is given to the driver, by providing himself with two sets of cards and flags, to cheat the public: on the contrary, I think that sort of fraud is sufficiently guarded against by this order. Upon the whole, it seems to me that the order is fully warranted by the statute, and that a conviction ought to have taken place.

WILLES, J. I am of the same opinion. The objection to this order seems to be that the secretary of state has not fixed the fares so as to be a compliance with the statute. It might possibly have been more convenient to divide the licensed hackney-carriages into classes, and to have allowed a fixed rate, say of 1*s.* 6*d.*, 1*s.*, and 6*d.* per mile respectively. Instead of doing so, the order provides that, when a licence is applied for, the carriage shall be inspected by

the proper officer, that the application for the licence shall specify the sums which the applicant desires to have inserted in the licence as the rates at which the carriage shall ply for hire, by distance and by time respectively, and that the licence when granted shall state that charge. If the secretary of state and those acting under him were very capricious persons, one might conceive the possibility of difficulties arising such as the magistrate suggests. But that is one of the remote contingencies which Acts of parliament do not contemplate; and we are not to assume that public officers will do anything unjust or tyrannical. The course which the secretary of state has by this order adopted seems to me to determine sufficiently the scale of fares and the mode of making that scale in each case known to the public. The result will be that carriages will be provided at the accustomed fares, or a better class of conveyances for a higher charge. The inspector will take care that the order is properly carried out in this respect. I cannot agree with the magistrate, however well reasoned his observations may be.

BRETT, J. I must confess I have felt some difficulty in this case. I do not think either the Act of parliament, the order of the secretary of state, or the case submitted to us, at all satisfactory. Mr. Archibald says that the order is a proper compliance with sections 6 and 9 of the Act. The mixing up the two provisions, and making the order partly under one and partly under the other, does not, however, seem to me to be a very convenient way of dealing with the matter, or at all fair to the public.

Decision reversed.

Attorneys for appellant: *Raven & Bradley.*

1870
Nov. 24.

BECHERVAISE *v.* THE GREAT WESTERN RAILWAY COMPANY.

Practice—Interrogatories under s. 51 *of Common Law Procedure Act*, 1854. (17 & 18 *Vict. c.* 125.)

A judge at chambers refused, before declaration, to allow the following interrogatory to be put to the secretary of a railway company, in an action for negligence:—

"5. If you say that there was a collision, what was it that the train in which the plaintiff was a passenger came into collision with? Were the defendants possessed thereof? Was it under the care of themselves or any one or more of their servants? Was it on the same rails with the said train? Was it standing still or moving? If moving, was it moving towards H., or in the opposite direction? How came it to be on the rails there? If there was any other cause of the collision or other accident beyond what you have stated, what was it?"

The Court refused a rule to vary his order.

In an action against the Great Western Railway Company for a personal injury sustained by the plaintiff through the alleged negligence of the defendants' servants, upon a summons at chambers, before declaration, and upon the ordinary affidavit, for leave to administer interrogatories to the secretary of the company, under s. 51 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), Byles, J., allowed

"8. Have the defendants ever had in their possession or control any and what report or reports, letter or letters, writing or writings, memorandum or memoranda, entry or entries, receipt or receipts, document or documents, relating to the matters in dispute in this action, or any of them? If yea, which of them are now in the defendants' possession or control, and have the defendants any and what objection to produce any and which of them? And what do you know as to the possession or control of the others of them since they were last in the defendants' possession or control? If any of them have been lost or destroyed, what do you know of their contents, so far as they related to the matters in dispute?"

The following interrogatory was disallowed:—

"5. If you say that there was a collision, what was it that the train in which the plaintiff was a passenger came into collision with? Were the defendants possessed thereof? Was it under the care of themselves or any one or more of their servants?

Was it on the same rails with the said train? Was it standing still or moving? If moving, was it moving towards Hereford, or in the opposite direction? How came it to be on the rails there? If there was any other cause of the collision or other accident beyond what you have stated, what was it?"

Michael moved for a rule to vary the order of Byles, J., by restoring the 5th interrogatory. It is an essential part of the plaintiff's case to prove the cause of the collision; and this is a matter which in almost every instance can only be in the knowledge of the servants of the company. If the information which is sought by this interrogatory had been contained in reports made in writing to the superintendent or manager by servants or agents of the company, the plaintiff might have had inspection of those documents: *Woolley* v. *North London Ry. Co.* (1); and there can be no reason why he should not be equally at liberty to interrogate the secretary as to matters which may have been the subject of oral communications. This case comes clearly within the rule laid down by the Court of Exchequer in *Bayley* v. *Griffiths* (2) and by the Court of Queen's Bench in *Atkinson* v. *Fosbroke.* (3)

WILLES, J. My Lord takes no part in this case. It is not a sufficient foundation for an application for leave to administer interrogatories that the matter as to which the opposite party is sought to be interrogated is relevant to some issue in the cause. The practice which prevails in Chancery as to discovery was purposely avoided in framing s. 51 of the second Common Law Procedure Act; and it was intentionally enacted that there should be interposed between the applicant and the person who might have to pay the costs of the proceeding, the discretion of a judge who is to determine to what extent and at what time interrogatories should be allowed. It may very well be that interrogatories which may be proper at the time the cause is at issue may be improper and unjust at an earlier stage. The application may be a mere means of heaping up costs; and it is the duty of the judge to look closely to see that the interrogatories are sought for the bonâ fide purpose of obtaining real information, and not

(1) Law Rep. 4 C. P. 602. (2) 1 H. & C. 429; 31 L. J. (Ex.) 477.
(3) Law Rep. 1 Q. B. 623.

1870

BECHERVAISE v. GREAT WESTERN RAILWAY CO.

for the mere purpose of enhancing the costs. If really necessary, it will appear so when the plea comes in. Or it may be that there are special circumstances to warrant the allowance of interrogatories at an earlier stage; but this should be made to appear by a special affidavit. To ask the secretary of a railway company to state the cause of an accident at which he was not present hardly accords with common sense; and common sense ought to guide us in matters of this sort. I think my Brother Byles exercised a wise discretion in disallowing the 5th interrogatory; and I incline to think that the plaintiff will get all the benefit he requires from the 8th. I prefer, however, to rest my opinion upon the general ground I have above intimated.

BYLES and KEATING, JJ., concurred.

Rule refused.

Attorneys for plaintiff: *Miller & Miller.*

Nov. 16.

PHILLIPSON *v.* HAYTER.

Husband and Wife—Authority of Wife to pledge Husband's Credit—Necessaries—Articles of Luxury—Evidence for a Jury.

A wife has implied authority to pledge her husband's credit for such things only as fall within the domestic department ordinarily confided to the wife's management, and are necessary and suitable to the style in which her husband chooses to live; or for goods, if she carries on a separate trade with the concurrence of her husband, suitable for such trade.

It is not enough, where the burthen of proof lies on the plaintiff, for him to prove facts which are equally consistent with the negative as with the affirmative of the proposition which he has to establish.

ACTION for goods sold and delivered. Pleas: 1. Except as to 8*l.*, never indebted. 2. Payment into court of 8*l.* Issue, and damages ultrâ.

The plaintiff, a stationer and music-seller at Kingston, sued the defendant for the price of goods supplied to the defendant's wife to the amount of 20*l.* 4*s.* 2*d.* The cause being at issue, the plaintiff obtained a judge's order for a trial in the Kingston county court. The substance of the evidence there given was, that the

goods in question (amongst which were "a gold pen and pencil-case, 2*l.* 12*s.* 6*d.*," "a seal-skin cigar-case, 17*s.* 6*d.*," "a seal-skin tobacco-pouch, 8*s.* 6*d.*," "a glove and handkerchief box, 1*l.* 10*s.*," "a double scent-bottle, 1*l.* 10*s.*," "engraving a die C. H., 8*s.* 6*d.*," "a guitar, 6*l.* 6*s.*," "ten pieces of music, 1*l.* 11*s.* 9*d.*," "a Russia purse, 1*l.* 5*s.*,") were supplied to the defendant's wife; that she went to the plaintiff's shop alone, except on one occasion when a gentleman (with whom she was said to have afterwards eloped) was with her; that the defendant, at the time the goods were supplied, was a clerk at 400*l.* a year, living in a house the rent of which was 70*l.* per annum, having two children, and keeping three servants; and that the wife had a separate income of 90*l.* a year.

There was no evidence that the defendant had ever seen any of the articles until after the elopement of his wife, when the guitar and music were found in a drawer in a spare room in the defendant's house; and the defendant swore that he had never bought any goods at the plaintiff's shop on credit, and that he had never authorized his wife to pledge his credit, but, on the contrary, had expressly desired her not to do so.

The judge left the following questions to the jury: 1. Did the plaintiff intend to give credit to the husband? 2. Did the husband authorize the wife impliedly to pledge his credit to the plaintiff? 3. Were the articles she purchased suitable and proper to her condition? The jury answered all three questions in the affirmative, and a verdict was entered for the plaintiff for the full amount.

This Court, in Trinity Term last, made absolute a rule for a new trial, and directed that it should take place in the superior court.

On the second trial, before Byles, J., at the sittings at Westminster after Trinity term, 1870, the evidence was substantially the same as on the first trial. The learned judge left two questions to the jury: 1. Were the articles furnished (beyond those the price of which was covered by the money paid into court) necessary, that is, suitable to the estate and degree of the husband? 2. If they were necessaries, was the wife prohibited by her husband from incurring these debts? And the learned judge added: "For

1870

PHILLIPSON v. HAYTER.

myself, I certainly had thought, but erroneously, that a tradesman was not bound by a limitation of the ordinary authority between husband and wife unknown to him. But the Court of Common Pleas has held a contrary opinion (1); and the law is, as I understand it, that, even if these things were all of them necessary, yet, if the wife in point of fact (although the tradesman did not know it) was prohibited by her husband from incurring these or any other debts, the plaintiff cannot recover."

The jury again returned a verdict for the plaintiff for the full sum claimed; and leave was reserved to the defendant to move to enter a nonsuit, the Court to draw any inferences of fact consistent with the finding of the jury, and their judgment to be final and conclusive.

Codd obtained a rule nisi accordingly, or for a new trial on the ground that the verdict was against evidence.

C. Russell and *Foard* shewed cause. The real question is whether there was such a total absence of evidence of the wife's authority to pledge her husband's credit for the disputed articles as would have warranted the judge in withdrawing the case from the jury: *Ryder* v. *Wombwell.* (2)

[WILLES, J. The rule which now prevails is, that the judge is justified in withdrawing a case from the jury where there is no reasonable evidence upon which they could act. It is so stated by Cresswell, J., in *Avery* v. *Bowden* (3); and for this he vouches the opinion of Lord Tenterden.]

The question is one of authority only, and must depend upon the nature of the things supplied and the position which the husband permits his wife to occupy: *Keller* v. *Phillips* (4); *Cromwell* v. *Benjamin* (5). And see Schouler's Domestic Relations, pp. 81 et seq.

James, Q.C., and *Codd*, in support of the rule. In *Freestone* v. *Butcher* (6), Lord Abinger in his summing-up says: "In the cases of orders given by the wife in those departments of her husband's

(1) In *Jolly* v. *Rees*, 15 C. B. (N.S.) 628; 33 L. J. (C.P.) 177.

(2) Law Rep. 4 Ex. 32, 38.

(3) 6 E. & B. 953, 974; 26 L. J. (Q.B.) 3.

(4) 12 Tiffany (American) R. 351; 40 Barbour, 390.

(5) 41 Barbour, 558.

(6) 9 C. & P. 643, 647.

household which she has under her control, the jury may infer that the wife was the agent of her husband, till the contrary appears. So, for such articles as are necessary for the wife, such as clothes, if the order is given by the wife, and she is living with her husband, and nothing appear to the contrary, the jury do right by inferring the agency; but, if the order is excessive in point of extent, or if, when the husband has a small income, the wife gives extravagant orders, these are circumstances from which the jury would infer that there was no agency." And this ruling was cited with approval by Parke, B., in *Lane* v. *Ironmonger* (1), with a slight qualification. The mere character of wife, however, has never been held to clothe her with authority to pledge her husband's credit for things not falling strictly within that class. Looking at the position in life of these parties, no jury would be warranted in finding that the wife had an implied authority to contract for articles of the description of those above enumerated; and express authority was distinctly negatived. There was, consequently, no evidence which could properly be left to the jury.

BOVILL, C.J. In all the cases in which it is sought to make a husband responsible for goods supplied to the order of his wife, the question has turned upon her authority to bind him by her contract; and that authority must be proved as in all other cases. Unless she has been held out by her husband as one having power to contract on his credit, he is not responsible. What, then, is the authority on the part of the wife which is generally to be implied? The domestic arrangements of the family being usually left to the control of the wife, her authority extends to all those matters which fall within her department, as, for instance, the supply of provisions for the house, clothing for herself and children, and things of that sort. Or, if the wife, with the concurrence of her husband, carries on a separate trade, goods supplied to her for the purposes of that trade would fall within the same category. Many old cases on the subject are referred to in Comyns's Digest, Baron and Feme (Q.), some of which, no doubt, would now be considered not to be law. Even that limited authority must, however, be subject to this condition, that the

(1) 13 M. & W. 368.

1870

PHILLIPSON v. HAYTER.

goods be suitable to the position which the husband allows his wife to assume, or to the trade which he allows her to carry on. In the present case there is not the slightest evidence that the wife was expressly authorized by her husband to order the goods in question upon credit. They were ordered without his knowledge, and it was proved that he never saw them. Several of the articles were of a character which could not be regarded as suitable to the position of the parties, or come within any implied authority of a wife to pledge her husband's credit; and, these being deducted from the plaintiff's claim, the sum paid into court would suffice to cover all he was entitled to. Most of them are articles of mere luxury, as to which the Courts have invariably repudiated the notion of the wife's having any implied authority to charge her husband. The rule must, therefore, be made absolute to enter a nonsuit.

WILLES, J. In this case the wife eloped from her husband, and then he for the first time discovered that she had been professing to pledge his credit for things which he never in any sense authorized her to purchase, and which he never before saw or heard of. If he is bound to pay for those articles, it must be because the law infers from the relation of husband and wife some authority in the wife to order them. What the law does infer is, that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confided to the management of the wife. And it is incumbent on the tradesman who relies upon the goods coming within that description to prove affirmatively that they do so. The burthen of proof lies on him. He must shew, not that they must have been such articles as come within that implied authority, but so strong a probability that they were as to induce any reasonable mind to infer that the wife was acting under the authority of her husband. It is not enough, where the burthen of proof lies on the plaintiff, for him to prove facts which are equally consistent with the affirmative or the negative of the proposition sought to be made out. Cresswell, J., in *Avery* v. *Bowden* (1), dealing with the question what sort of evidence ought

(1) 6 E. & B. 953, 974; 26 L. J. (Q.B.) 3.

to be submitted to a jury, says: "Lord Tenterden said that, if the evidence was such that the jury could conjecture only, not judge, it ought not to go to the jury; that the onus lies on the party offering the evidence; and that he, if he offered only evidence consistent with either supposition of fact, was not entitled to have it put to the jury." And the learned judge, referring to the practice on bills of exceptions, adds: "If the evidence lead only to conjecture, it is not fit for the consideration of the jury." In the present case, as to goods to a value far exceeding 12*l.* 4*s.* 2*d.*, evidence was given which rested on conjecture alone; and I can only account for the conduct of the jury in coming to the conclusion that they were goods which might properly be supplied to the wife on her husband's credit, without inquiry, by supposing that they misapprehended the questions which were left to them, and chose to take upon themselves to judge what ought to be the expenditure of a person living in the manner the defendant did; or by ascribing it to the general luxury and degeneracy of the age, which induces men to keep up appearances which are not warranted by their means. The items at the end of the plaintiff's particulars reduce the matter to a positive absurdity. There is a charge of 6*l.* 6*s.* for a guitar, and 1*l.* 11*s.* 9*d.* for music, which were found after the wife's elopement, locked up in a drawer in a spare room of the defendant's house, and as to which there was no evidence that the husband had either seen or heard of them. As to all the articles objected to, I think there was no evidence which ought to have been left to the jury.

MONTAGUE SMITH, J. I must own I have felt some doubt whether, as to certain of the articles objected to, there was not some evidence which was proper for the jury. But I yield to the greater experience of my Lord and my Brother Willes on these matters.

Rule absolute.

Attorneys for plaintiff: *Wilkinson & Howlett.*
Attorney for defendant: *G. F. Cooke.*

1870
Nov. 11.

TALLEY *v.* THE GREAT WESTERN RAILWAY COMPANY.

Railway Company—Passenger's Luggage—Common Carriers—Negligence.

When a passenger's luggage is at his request placed by a railway company's servants in the carriage in which he is travelling, the company's contract to carry it safely is subject to an implied condition that the passenger takes ordinary care of it, and if his negligence causes its loss the company are not responsible.

A passenger whose portmanteau had been placed at his request in the carriage with him got out at an intermediate station on his journey, and having negligently failed to find the same carriage again, finished his journey in a different one; the portmanteau having been robbed during the latter part of the journey by persons in the carriage without any negligence of the railway company:—

Held, that the railway company was not responsible for the loss.

APPEAL from the County Court of Middlesex, held at Marylebone.

The facts as stated in the case on appeal were in substance as follows:—

This action was tried in the Marylebone County Court on the 5th of October, 1869, and a verdict was given for the plaintiff for 16*l.* 10*s.*

A new trial was subsequently granted, and such new trial came on for hearing on the 1st of December, 1869, before the deputy judge and a jury.

The following were the particulars of claim:—

For that the defendants were carriers of passengers and their luggage from Cheltenham to Reading, and that the defendants, on the 27th day of March, A.D. 1868, promised for reward paid to them by the plaintiff in that behalf to carry the plaintiff and his luggage safely and securely from Cheltenham to Reading. Yet the defendants did not so convey the plaintiff's luggage safely and securely, but entirely made default in so doing, whereby the plaintiff was deprived of the said luggage, and was put to much trouble and expense in endeavouring to obtain the same, and in providing other goods in the place of the said luggage, and the plaintiff claims 18*l.*

At the trial the following facts were proved:—

1. The plaintiff on the 26th of March took an ordinary first-class return ticket from Reading to Cheltenham and back.

Reading is a station on the Great Western original main line as

authorized to be constructed by Act of Parliament, 5 & 6 Wm. 4, c. cvii.; and Cheltenham is also a station belonging to the Great Western Railway Company; and the railway from Cheltenham to Swindon (on the main line) was authorized to be constructed by 6 Wm. 4, c. lxxvii.

2. The plaintiff, in time for the 6.50 train on the 27th of March, went to the Cheltenham station, and on arriving at the station he handed his portmanteau to the guard, and got into a first-class carriage, and the guard placed the portmanteau under the seat of the carriage (1). The plaintiff travelled safely with his portmanteau to Swindon, and on arriving at that station he got out for the purpose of taking some refreshments—ten minutes being the time allowed by the company's printed regulations for that purpose. Four other passengers had travelled in the same carriage with the plaintiff, who all got out at the same time for a like purpose.

3. The plaintiff was away for nearly ten minutes at the refreshment-room, and on his return to the platform he was unable to find the carriage, which, with all the first-class carriages that came from Cheltenham, had in his absence and without intimation to him been shunted on to the main line, as carriages usually are at Swindon Station.

4. It was sworn by the plaintiff that upon making immediate inquiries of the guard, he was informed that the carriage he had occupied was not going on, and that his luggage had been removed into the van. He further alleged that he continued to remonstrate with the guard, and eventually, having delayed the train some minutes, entered another carriage.

Vale, the guard from Cheltenham to Swindon, denied the plaintiff's statement that he had informed him the carriage was not going on and his luggage was removed into the van. He swore that when spoken to by the plaintiff about the loss, he pointed to the carriage as the one he had travelled in, and he did not go with the plaintiff to where it stood, because he feared ill treatment from some of the passengers who had travelled to Swindon in some of the shunted carriages. The guard further proved that the carriages had been shunted by one of the company's servants not called at

(1) This it would seem was done by the guard at the request of the plaintiff. See the second question put to the jury, post, pp. 46, 47.

1870

TALLEY v. GREAT WESTERN RAILWAY CO.

the trial, and that no extra servants had been employed at the station, and that in consequence (it being a full train returning from Cheltenham Races) the train was delayed ten minutes beyond its proper time there, and that he told the plaintiff that two of the carriages were not going on to London.

5. All the first-class carriages, by the train in question (except two which had joined the train at Gloucester from South Wales and had not come from Cheltenham), went up to London by the same train as the plaintiff quitted at Reading, and on arriving in London the portmanteau was found by Farquharson, the guard, who had joined the train at Swindon in Vale's place, and who proved finding it in one of the carriages from Cheltenham, but it had, however, been cut open and a portion of its contents had been abstracted.

6. At the conclusion of the plaintiff's case, the judge was requested by the defendants' attorney to direct a nonsuit on the ground that there was no evidence that the plaintiff had entrusted the portmanteau to the care of the defendants, and on the ground that there was evidence of contributory negligence on the part of the plaintiff.

It was thereupon contended by the plaintiff's counsel that if it were an action of contract the doctrine of contributory negligence did not apply, and that if it were an action of tort, any private Act of parliament limiting the liability of the company could not, under rule 96 of the County Court Rules and Orders, be given in evidence. It was admitted or agreed by the defendants' attorney that this action was, and was to be treated as, an action of contract entirely.

7. The judge declined to nonsuit the plaintiff, and received the defendants' evidence: and upon the whole case, subject to the objection of the plaintiff's counsel that the question of contributory negligence should not be left to the jury, the verdict of the jury was taken by the judge in answer to the five following written questions, with further explanation by the judge:—

First. Was there a delivery to the Great Western Company's servants or porter at Cheltenham station by the plaintiff on his arrival there?

Second. Was there such an assumption of personal control of

the portmanteau when delivered into the carriage at the plaintiff's desire, as to amount to an entire assumption by him of liability?

Third. If so, was there at Swindon a fresh undertaking of liability on the part of the defendants?

Fourth. Was there a want of due diligence on the part of the defendants' servants at Swindon when their attention was called to the loss of the portmanteau?

Fifth. Did the plaintiff, by his negligence, contribute to the loss of the portmanteau?

8. The jury answered the three first questions in the affirmative, the fourth in the negative, and to the fifth replied "Yes." Thereupon both the plaintiff and the defendants claimed the verdict. The judge directed a verdict to be entered for the plaintiff for 16*l.* 10*s.*, the amount claimed, and granted leave to the defendants to appeal.

9. In further explanation of the fourth question, the judge also asked the jury broadly, whether there was at Swindon any negligence on the part of the plaintiff.

The questions for the opinion of the Court were,

1. Should the judge have directed the plaintiff to be nonsuited?

2. Should the question of the plaintiff's contributory negligence have been left to the jury?

3. Should the verdict, upon the finding of the jury, have been entered for the plaintiff or the defendants?

A further question as to the amount of the damages became immaterial, the judgment being for the defendants.

Paine (*Lopes, Q.C.*, with him), for the defendants. There are two principal questions in this case: first, what is the liability of a railway company with respect to a passenger's luggage carried with him in his carriage? secondly, to what extent are they freed from liability by negligence of the passenger contributing to the loss of the luggage? There are no doubt some decisions which tend to shew that the company are common carriers of passengers' luggage, and as such insurers of it; such are *Richards* v. *London, Brighton, and South Coast Ry. Co.* (1), and *Butcher* v. *London and South*

(1) 7 C. B. 839; 18 L. J. (C.P.) 251.

1870

TALLEY v. GREAT WESTERN RAILWAY CO.

Western Ry. Co. (1), and some American decisions cited in Hodges on Railways, p. 570; and this is also laid down in Story on Bailments, § 499. It has been decided, however, that they are only liable for injury to passengers themselves if it results from the negligence of the company or their servants, and in *Stewart* v. *London and South Western Ry. Co.* (2), which is a later case than those above cited, Pollock, C.B., expressed great doubt whether there was any greater liability in respect of their luggage.

[WILLES, J. Was the luggage in that case placed in the carriage with the passenger?]

No, it was placed in the van; if there is any distinction between luggage placed in the van and in a carriage with the passenger, it must be a question for the jury in the latter case under whose control it was, and here the jury have found in the defendant's favour that they were guilty of no negligence, and that the negligence of the plaintiff contributed to the loss. The doctrine of contributory negligence may be applied in a case like the present whether the form of the claim be contract or tort, and it is immaterial therefore that in the court below this was agreed to be treated as an action of contract. Supposing, in the course of the journey, the plaintiff had thrown the portmanteau out of the window, or supposing he had been intoxicated and had looked on while other persons in the carriage did so, would the company have been liable for such a loss? yet that would be in substance the same case as the present. [He referred to *Dansey* v. *Richardson* (3), and *Robinson* v. *Dunmore*. (4)]

Finney, for the plaintiff. It has been settled by authority that passengers luggage is carried by railway companies as common carriers. One of the earliest cases is *Brooke* v. *Pickwick*. (5)

[WILLES, J. There there was evidence of negligence on the part of the defendants.]

It was followed by the cases of *Richards* v. *London, Brighton, and South Coast Ry. Co.* (6), and *Butcher* v. *London and South Western*

(1) 16 C. B. 13; 24 L. J. (C.P.) 137.

(2) 3 H. & C. 135, 139; 33 L. J. (Ex.) 199.

(3) 3 E. & B. 144; 23 L. J. (Q.B.) 217.

(4) 2 B. & P. 416.

(5) 4 Bing. 218.

(6) 7 C. B. 839; 18 L. J. (C.P.) 251.

Ry. Co. (1), which are referred to as authorities in the passage of Story that has been cited. All the text books contain the same doctrine, and the dictum of Pollock, C.B., in *Stewart* v. *London and North Western Ry. Co.* (2) is the only one that throws any doubt upon it. A still later case is *Le Couteur* v. *London and South Western Ry. Co.* (3) There Cockburn, C.J., referring to the fact that the luggage had been placed in the carriage with the passenger, says, "I cannot think, therefore, that we ought to come to any conclusion which would release the company under such circumstances from the obligation as carriers of carrying luggage safely which for general convenience ought certainly to attach to them."

[WILLES, J. That is explained by the case of *Ross* v. *Hill* (4), where it was held that an averment in a declaration that the defendant was bound to carry luggage "safely and securely," did not necessarily mean with the liability of a common carrier.]

In *Le Couteur* v. *London and South Western Ry. Co.* (3) the other judges also expressly state that the company had the chronometer, though placed in the passenger's carriage, in their custody as common carriers, and were protected by the Carriers Act, and their obligation must be correlative to the protection afforded them.

[WILLES, J. The Carriers Act expressly refers to luggage carried with the passenger.]

If the passenger threw the portmanteau out of the window himself, and so was the sole cause of the loss, the company no doubt would not be liable; but here the plaintiff at most only contributed to the loss by his negligence, and that will not relieve the defendants, who were insurers, of their liability.

Paine, in reply.

Cur. adv. vult.

Nov. 11. The judgment of the Court (Willes, Keating, and Montague Smith, JJ.), was delivered by

WILLES, J. This was an appeal from the judgment of a county court in favour of the respondent, who was plaintiff below.

(1) 16 C. B. 13; 24 L. J. (C.P.) 137.
(2) 3 H. & C. 139; 33 L.J. (Ex.) 199.
(3) Law Rep. 1 Q. B. 54, 59.
(4) 2 C. B. 877.

BIBL. LONDIN

1870

TALLEY v. GREAT WESTERN RAILWAY CO.

The plaintiff, a passenger by the defendant's railway, upon a return journey from Cheltenham to Reading, had his portmanteau put into the same carriage with him. At Swindon the train stopped as usual for ten minutes, the plaintiff got out for refreshment, and upon returning failed to find his carriage, which however, in fact, continued in the train until it reached Paddington. He completed his journey from London in another carriage of the same train, and afterwards obtained his portmanteau minus a portion of its contents, which had been stolen by some person in the carriage after he left it at Swindon, and before its arrival at London. This action was thereupon brought to recover the value of the missing articles.

There was contradictory evidence as to what passed at Swindon, and especially as to the circumstances which led to the plaintiff's getting into another carriage, and so becoming separated from his luggage. The jury must be taken to have believed the evidence of the company in preference to that of the plaintiff, for they negatived any negligence on the part of the company's servants, and found that the plaintiff by his negligence contributed to the loss. This latter finding also shews that the jury must have adopted as the more probable conclusion that the theft took place between Swindon and London, so that the portmanteau would have been safe under the plaintiff's protection had he regained the carriage. Notwithstanding these findings of the jury, the verdict was by direction of the judge entered for the plaintiff, with leave to appeal; whereupon this appeal was brought.

The law laid down by Chambre, J., in *Robinson* v. *Dunmore* (1) as to stage-coaches has been considered by eminent authorities to be in general equally applicable to railway carriages, viz., that "if a man travel in a stage-coach and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost" (see *Richards* v. *London and Brighton Ry. Co.* (2); *Butcher* v. *London and South Western Ry. Co.* (3); *Le Couteur* v. *London and South Western Ry. Co.* (4)); though it has been questioned by equally high authority whether the liability in

(1) 2 B. & P. at p. 419.
(2) 7 C. B. 839; 18 L. J. (C.P.) 251.
(3) 16 C. B. 13; 24 L. J. (C.P.) 137.
(4) Law Rep. 1 Q. B. 54.

1870

TALLEY v. GREAT WESTERN RAILWAY CO.

respect of passengers' luggage is as stringent as that in respect of the ordinary carriage of goods, and whether there be any larger obligation in respect of goods carried with passengers than in respect of the passengers themselves to whom they are accessory: *Stewart* v. *London and North Western Ry. Co.* (1); and see *Munster* v. *South Eastern Ry.* (2); and it should be remarked that in the case of *Butcher* v. *London and South Western Ry. Co.* (3), and *Le Couteur* v. *London and South Western Ry. Co.* (4), there was evidence of negligence on the part of the company's servants.

Whatever may be the correct solution of this question, it is obvious at least that with respect to articles which are not put in the usual luggage van, and of which the entire control is not given to the carrier, but which are placed in the carriage in which the passenger travels, so that he and not the company's servants has de facto the entire control of them whilst the carriage is moving, the amount of care and diligence reasonably necessary for their safe conveyance is, in fact, considerably modified by the circumstance of their being during that part of the journey in which the passenger might, under ordinary circumstances, be expected to be in the carriage intended by both parties to be under his personal inspection and care. To such a state of things the rule which binds common carriers absolutely to ensure the safe delivery of the goods, except against the act of God or the Queen's enemies, whatever may be the negligence of the passenger himself, has never, that we are aware of, been applied. If the passenger packed up articles liable to ignition by friction and by the shaking of the carriage they caught fire; if a passenger were to look on whilst his luggage was being taken away or rifled, when he might reasonably be expected to interfere; if he were to expose small articles of apparent great value in a conspicuous part of the carriage and leave them there whilst he unreasonably absented himself and they were in consequence purloined, he would have no more just reason for complaint against the carrier than if he had upon some false alarm thrown his property out of the carriage-

(1) 3 H. & C. 139; 33 L. J. (Ex.) 199.

(2) 4 C. B. (N.S.) 676; 27 L. J. (C.P.) 308.

(3) 16 C. B. 13; 24 L. J. (C.P.) 137.

(4) Law Rep. 1 Q. B. 54.

1870

TALLEY v. GREAT WESTERN RAILWAY CO.

window. The latter case, equally as the former, would in terms be out of the exception of the act of God or the Queen's enemies, and the rule specially affecting the liability of common carriers, if construed literally, and without regard to the reason upon which it is founded, would prevail. There is great force in the argument that where articles are placed with the assent of the passenger in the same carriage with him, and so in fact remain in his own control and possession, the wide liability of the common carrier, which is founded on the bailment of the goods to him and his being entrusted with the entire possession of them, should not attach, because the reasons which are the foundation of the liability do not exist. In such cases, the obligation to take reasonable care seems naturally to arise, so that when loss occurred it would fall on the company only in the case of negligence in some part of the duty which pertained to them.

There is, moreover, a general principle applicable to these as to all bailments, viz., that the bailee shall not be heard to complain of loss occasioned by his own fault, and the loss in this case was so occasioned, and without such fault would not have taken place. In truth the expression "contributory" negligence in such a case is inaccurate if it imply any negligence on the part of the company, all the negligence having flowed from one source, viz., the conduct of the passenger, and the whole loss having been occasioned thereby. The verdict is that the company's servants were not negligent and that the passenger was, and that by his negligence he contributed to the loss, the other "contributory" thereto being the thief, to whom such negligence gave the temptation and the opportunity.

The question, apart from the more general one as to the extent of liability for passengers' luggage, is thus reduced to whether there was any sufficient evidence to justify the jury in finding that the loss was occasioned by the passenger's negligence in the sense of neglect of duty; whether, in fact, the passenger, as between him and the company, assumed any duty in respect of the portmanteau; for in the absence of duty there could be no negligence such as to affect his remedy against the company.

Upon this we are of opinion that the jury were justified in inferring from the circumstance of the portmanteau being put with the

passenger's assent, and of course for his convenience, into the carriage in which he was to travel, and so out of the immediate and active control of the company's servants instead of in the ordinary luggage-van, where it would have been under such control that it was intended by both parties, and was an implied term in the contract of carriage, that in return for the convenience of having his luggage at hand the passenger should during the journey take such reasonable care of his own property as might be expected from an ordinarily prudent man, and should not by his own negligence expose it to more than the ordinary risk of luggage carried in a passenger carriage, and that the finding of negligence in not using such reasonable care was sustained by the evidence.

This is enough to dispose of the case; but it may be proper to say a word upon the questions left to the jury and their answers, as to the delivery of the goods and the responsibility successively assumed by the company and the plaintiff. The first finding that there was a "delivery to the servants of the company," decides nothing as to the terms of the delivery. The second finding, that "there was such an assumption of personal control of the portmanteau when delivered into the carriage at the plaintiff's desire, as to amount to an entire assumption by him of liability," and the finding that, "if so, there was at Swindon a fresh undertaking of liability on the part of the defendants," appear to be inconsistent, for if the plaintiff upon getting his luggage into the carriage assumed the *entire* liability he could not cast it back upon the company by his own neglect; and, in strictness, perhaps, the latter finding ought to be rejected, leaving the former conclusive against the plaintiff. We do not, however, proceed upon this ground, seeing that the question which led to the former finding involved matter of law as to which the plaintiff ought not to be concluded by the verdict. Had the case turned upon this point we might have thought it necessary to direct a new trial.

Upon the ground first explained, however, videlicet, that the general liability of the company was, under the circumstances, modified by the implied condition that the passenger should use reasonable care, and that the loss was caused by his neglect to do so, and would not have happened without such negligence, we

1870

TALLEY v. GREAT WESTERN RAILWAY CO.

think the judgment of the county court ought to be reversed and the verdict entered for the defendants.

The costs must follow the event.

Judgment reversed.

Attorney for plaintiff: *Talley.*

Attorneys for defendants: *Young, Maples, Teesdale, & Nelson.*

Nov. 17.

THE BANK OF HINDUSTAN, CHINA, AND JAPAN, LIMITED, *v.* ALISON.

Banking Company—Amalgamation—Action for Calls—Estoppel by Conduct—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

Two incorporated banking companies, the Bank of Hindustan and the Imperial Bank of China (under the powers contained in their respective articles of association), agreed to amalgamate, the business of the latter company being transferred to the former, and the shareholders in the Imperial Bank of China having the option of taking newly-created shares in the Bank of Hindustan at a premium, part of which was to be paid out of the funds of the Imperial Bank. The Bank of Hindustan issued circulars informing the shareholders in the Imperial Bank of the arrangement which had been made, and intimating to them that they had an option to take such new shares on the terms specified. The defendant, a shareholder in the Imperial Bank, in consequence, in 1864, applied for and obtained an allotment of twenty-five shares, paid a portion of the deposit and premium thereon, and by his letter of application engaged to pay the residue on a given day. Several calls were afterwards made, of which the defendant had notice; but he never repudiated his liability until an action was brought against him in 1867 for non-payment of those calls.

In 1868, the supposed amalgamation of the two banks was by a decree of a Vice-Chancellor, in a suit by dissentient shareholders in the Imperial Bank, declared to be void:—

Held, that the directors of the Bank of Hindustan had no power to issue the new shares, and that the defendant was not by any acquiescence or conduct on his part estopped from denying that he was a shareholder in the Bank of Hindustan.

ACTION to recover 598*l.* 4*s.* 2*d.*, a balance of premium on allotment of shares held by the defendant in the Bank of Hindustan, and calls thereon, with interest. The following case was stated for the Court:—

1. The Bank of Hindustan was registered and incorporated under the provisions of the Joint Stock Banking Companies Act, 1857

(20 & 21 Vict c. 49), and the Acts incorporated therewith, on the 11th of July, 1862. A copy of the memorandum and articles of association of the bank, as originally registered, accompanied the case.

2. The defendant was a holder of twenty-five shares in the Imperial Bank of China, India, and Japan, which was a company also registered and incorporated under the provisions of the Companies Act, 1862 (25 & 26 Vict. c. 89), on the 22nd of April, 1864. A copy of the memorandum and articles of association of this bank also accompanied the case.

3. The capital of the Bank of Hindustan was stated by the memorandum of association to be as follows:—The nominal capital of the bank is 1,000,000*l.*, divided into 10,000 shares of 100*l.* each, to be increased if need were to an amount not exceeding 2,000,000*l.*, by the creation of 10,000 additional shares of 100*l.* each, or of such smaller number of shares as might be deemed expedient. On the 18th of January, 1864, the Bank of Hindustan duly increased its capital to the amount of 2,000,000*l.* by the creation of 10,000 additional shares of 100*l.* each; and the whole of these shares were issued before the defendant entered into the alleged contract to take twenty-five shares, hereinafter mentioned.

3 *a.* By the memorandum of association of the Bank of Hindustan it was (inter alia) provided as follows:—

"(7.) The capital of the company shall consist of 1,000,000*l.*, divided into 10,000 shares of 100*l.* each, to be paid at the times and in the manner hereinafter provided. The board may from time to time, by a resolution passed by a majority consisting of not less than two-thirds of the whole number of directors, reduce the capital to any amount not being less than 500,000*l.* in shares of 100*l.* each; and the board may also from time to time, by a resolution passed by a majority consisting of not less than two-thirds of the whole number of directors, increase the existing capital to any amount not exceeding 2,000,000*l.*, by the creation of any number of new shares of 100*l.* each, not exceeding 20,000 in the whole, upon such terms, and either with or without preference or priority as regards dividends or otherwise over the shares in the then-existing capital, as such majority of the directors deem expedient.

"(8.) Provided that no resolution for the creation of new shares beyond the number of 10,000 shares in the capital of the company shall be valid until it shall have been ratified and confirmed by a resolution passed by the shareholders present, personally or by proxy, at an extraordinary meeting convened for that purpose, and at which there shall be present personally thirty or more persons who have been shareholders for at least three months next previous to such meeting."

1870

BANK OF HINDUSTAN v. ALISON.

4. By the articles of association of the Bank of Hindustan it was (inter alia) provided as follows:—

"Article 101. In their management of the business of the company, the directors, without any further power or authority from the shareholders, may do the following things, that is to say,—

"(12.) They may, upon such terms as they think fit, amalgamate with or purchase or acquire the business and property of any company, partnership, or persons carrying on any business included amongst the objects of this company as specified in the memorandum of association, and may pay for the same either in cash or in shares to be treated as either wholly or in part paid up, or partly in cash and partly in such shares, or in such other manner as the board may from time to time deem expedient."

5. In the middle of the year 1864, negotiations were entered into for the amalgamation of the Imperial Bank of China with the Bank of Hindustan, and for the transfer to the latter of the business of the former. The defendant was not aware of these negotiations beyond receiving the circulars hereinafter mentioned. He attended no meeting of either bank. Beyond the contents of the circular, the defendant had no knowledge of the matters referred to therein.

On the 28th of July, 1864, a circular was addressed by the directors of the Imperial Bank to their shareholders, stating that the negotiations which had been pending with the Bank of Hindustan for an amalgamation with that institution, had been brought to a successful issue; and that, as early as practicable, in accordance with the articles of association, an extraordinary general meeting of both companies would be convened to confirm the arrangements made by the directors, previous to which meeting all details of terms would be laid before the shareholders.

Accordingly, on the 10th of August, 1864, another circular was issued by the directors of the Imperial Bank to their shareholders, giving notice in the following terms:—

"With reference to the circular addressed to the shareholders on the 28th of July last, I have now to inform you that an extraordinary general meeting of the shareholders of this bank will be held at the London Tavern on Thursday the 25th instant, when the agreement entered into with the Bank of Hindustan will be submitted for approval, and resolutions to voluntarily wind up the bank and appoint liquidators will be proposed. The following are in substance the terms of amalgamation, viz.:—

"(1.) 20,000 new shares of 100*l.* each of the Bank of Hindustan to be issued to the holders of the 20,000 shares in this bank:

"(2.) Such shares to be issued at 6*l.* per share premium:

"(3.) 5*l.* per share of the premium to be placed to the reserve-fund of the united bank, in addition to the amount already at the reserve of the Bank of Hindustan, and also all further additions, by which the total reserve-fund at the end of this year will, with the profits, probably amount to 160,000*l.*:

"(4.) The remaining 1*l.* per share of the premium will be applied to pay off preliminary expenses:

"(5.) A dividend of 10*l.* per cent. per annum, free of income-tax, from the time that the bank has been in operation, to be paid to the shareholders of this bank on exchanging certificates:

"(6.) Four directors from this bank to be nominated and join the board of the Bank of Hindustan:

"(7.) The new shares to be issued as above to rank on equal terms as all the previous issues of the Bank of Hindustan, whether original or otherwise:

"(8.) The option of paying up to 25*l.* per share under discount at 6*l.* per centum per annum is also reserved to the shareholders."

The meeting was held on the 25th of August, 1864; and resolutions were passed: 1. approving the agreement dated the 24th of August, between the Bank of Hindustan and the Imperial Bank, and authorizing the directors of the Imperial Bank to affix the seal of the company thereto: 2. for winding up the company voluntarily: 3. appointing three of the directors liquidators for the purpose of winding up the affairs of the company and distributing the property, and authorizing them to receive in compensation or part compensation for the business and property in the Imperial, shares in the Bank of Hindustan, on the terms specified in the agreement. If any member should express his dissent from this resolution by a notice in writing to the liquidators not later than seven days after the meeting, and should require the liquidators to purchase the interest of such dissentient shareholder, the liquidators should raise the purchase-money to be paid to such dissentient member.

These resolutions were confirmed at another extraordinary general meeting of the Imperial company held on the 12th of September, 1864; the notice by which this subsequent meeting was convened stating in extenso the resolution passed on the 25th of August.

6. On the 24th of August, 1864, the agreement for amalgamation, a copy of which was set out in the case, was entered into.

7. At a board meeting of the directors of the Bank of Hindustan, held on the 1st of August, 1864, the heads of the agreement of the 24th of the same month were read and approved of, and an extraordinary meeting of the shareholders directed to be

1870

BANK OF HINDUSTAN v. ALISON.

called to ratify and confirm the same; and it was resolved by the board that, with a view to carry the same into effect, the capital of the company be increased from 2,000,000*l.* to 4,000,000*l.*, by the creation of 20,000 new shares of 100*l.* each, and that they be issued to the holders of the shares in the Imperial Bank of China, pursuant to the terms stated in such agreement.

An extraordinary meeting of the shareholders in the Bank of Hindustan was accordingly convened by a notice, as follows:—

"The Bank of Hindustan, China, and Japan, Limited.

"Notice is hereby given that an extraordinary meeting of the company will be held at the London Tavern, on Thursday, the 25th day of August current, and the business to be transacted will be the following:—

"1. To consider terms of arrangement with the Imperial Bank of China, and, if approved, to affix the seal of the company thereto, and authorize the directors to carry the same into effect.

"2. To elect four of the directors of the Imperial Bank of China as directors of this company.

"3. To ratify and confirm a resolution of the board increasing the capital of the company by the creation of 20,000 new shares of 100*l.* each at 6*l.* per share premium, to be issued to the persons and upon the terms stated in the above-mentioned agreement with the Imperial Bank of China.

"August 8th, 1864."

The meeting was, pursuant to the notice, held on the 25th of August, 1864; and it was resolved "that the capital of the company be increased by the creation of 20,000 new shares of 100*l.* each, to be issued at 6*l.* per share premium to the persons and upon the terms stated in the before-mentioned agreement; and that the resolution of the board to the above effect be ratified and confirmed.

9. A subsequent extraordinary meeting of the Bank of Hindustan was, on the 12th of September, 1864, held pursuant to a notice, as follows:—

"The Bank of Hindustan, China, and Japan, Limited.

"Notice is hereby given that an extraordinary general meeting of the company will be held at the banking-house of the company, No. 1, Bank Buildings, Lothbury, on Monday the 12th of September next; and the business to be transacted will be to confirm certain resolutions passed by the company in extraordinary general meeting on the 25th of August, 1864, of which the following are copies:—

"1. It was resolved that the agreement dated the 24th day of August, 1864, between this company of the first part, and the Imperial Bank of China of the other part, be approved, and the directors be authorized to affix the seal of the company to the same, and do all things necessary to carry it into effect.

"2. It was resolved that the capital of the company be increased by the creation of 20,000 new shares of 100*l.* each, to be issued at 6*l.* per share premium to the persons and upon the terms stated in the before-mentioned agreement, and that the resolution of the board to the above effect be ratified and confirmed.

"3. Resolved, that the directors be authorized to add four directors to their present board, to be selected by them from the existing board of the Imperial Bank of China."

And at such meeting the following resolutions were passed:—

"Resolved, that this meeting do confirm certain resolutions passed by the company in extraordinary general meeting on the 25th of August, 1864, of which the following are copies" (setting them out). A notice of these special resolutions was on the 14th of September, 1864, registered with the registrar of Joint Stock Companies.

The defendant at this time had paid 5*l.* per share on the shares held by him in the Imperial Bank of China; and after the aforesaid resolutions had been passed the liquidators of that company handed over to the Bank of Hindustan the assets thereof.

10. The above resolutions having been passed, the secretary of the Bank of Hindustan, on or about the 15th of September, 1864, sent out to the shareholders of the Imperial Bank, including the defendant, a circular as follows:—

"The Bank of Hindustan, China, and Japan, Limited.

"Issue of 20,000 new shares at 6*l.* per share premium, and 10*l.* per share deposit.

"Sir,—I have to inform you that, in right of your being a registered holder of shares in the Imperial Bank of China, you are entitled, under the terms of arrangement entered into between the two companies, to an allotment of a like number of shares in this company at 6*l.* per share premium, and by virtue of which your directors have paid on your account to this bank the sum of £——, being 5*l.* per share, on account of the deposit to be paid thereon. To entitle you to the above option, you must sign the inclosed form, and transmit the same to this bank on or before the 20th instant."

With such circular, printed forms of application for shares were inclosed; and the defendant filled up and signed and sent to the Bank of Hindustan two forms of application dated the 19th and 21st of September respectively, the one being for five and the other for twenty shares. These applications were in the following form:—

"The Bank of Hindustan, China, and Japan, Limited.

"Issue of 20,000 new shares at 6*l.* per share premium, and 10*l.* per share deposit.

"To the directors of the Bank of Hindustan, China, and Japan, Limited.

"Gentlemen,—As a registered holder of 5 [20] shares in the Imperial Bank of China, I hereby claim the privilege I am entitled to, of becoming a shareholder in

1870

BANK OF HINDUSTAN v. ALISON.

the Bank of Hindustan to the extent of the same number of shares I hold in such bank; and, having caused to be paid to your bank the sum of 25*l.* [100*l.*], being 5*l.* per share, on account of deposit on such 5 [20] shares, I hereby request that you will allot me that number; and I authorize you to place my name upon the register of members of your company for the same; and I agree to pay the sum of 30*l.* [120*l.*], being 5*l.* per share, the balance of the deposit of 10*l.* per share, and 1*l.* per share on account of premium, on the 12th of October next: and I further agree to pay the further sum of 25*l.* [100*l.*], being 5*l.* per share, the balance of 6*l.* per share on account of premium, on the 12th of January, 1865.

"Arthur Alison."

(Name, address, &c. &c.)

11. The twenty-five shares were allotted to the defendant on the 22nd of September, 1864, by a resolution of the board; and notice of the fact of the allotment being made was sent to and received by him on or about that date.

12. After the allotment of the shares, the sum of 5*l.* per share was credited to the defendant on each of the twenty-five shares held by him in the Imperial Bank, in accordance with the terms of the agreement of the 24th of August, 1864.

13. The defendant, on the 5th of January, 1865, paid the further sum of 150*l.*, being 5*l.* per share on account of deposit and 1*l.* per share on account of the premium of 6*l.* per share at which the shares were issued to the plaintiff, thus making a total of 275*l.*, which the defendant has paid.

14. On March 13th, June 19th, and September 18th, 1865, three calls each of 5*l.* per share were respectively made by the Bank of Hindustan on the defendant in respect of each of the twenty-five shares allotted to him in the manner aforesaid.

15. Notices of these calls were given to the defendant; but the defendant has not paid any of such calls, nor has he paid any portion of the balance of the premium of 6*l.* per share which was to have been paid on the 12th of January, 1865.

16. The defendant never applied for or received any certificates for shares in the Bank of Hindustan. They were made out in his name in due course, and were ready for and would have been handed him on application. They were never tendered to him. All notices were duly sent to his registered address. The defendant never attended any meeting of the company either personally or by proxy. He never received any dividend in the Bank of Hindustan, none ever having been declared since he applied for the shares.

1870

BANK OF HINDUSTAN v. ALISON.

On the 12th of March, 1866, the plaintiffs duly forfeited the defendant's twenty-five shares for non-payment of calls, in the manner provided for by the articles of association; and an entry of such forfeiture was made in the register of members of the bank; and a return was on the 25th of March made to the registrar of joint-stock companies of the forfeiture thereof.

Certain shareholders in the Imperial Bank repudiated the agreement; and on the 5th of May, 1866, a bill was filed, by leave of the Lords Justices, granted on a petition presented to wind up the Imperial Bank, in the first instance in the name of the company, and afterwards by amendment in the names also of two of such dissentient shareholders, Higgs and Marten, praying that the pretended amalgamation and transfer might be set aside as invalid and ultrà vires. The bill came on for hearing before Giffard, V.C., on the 6th and 7th of May, 1868, and a decree was made setting aside the amalgamation as ultrà vires and inoperative.

The proceedings, evidence, and judgment in the suit, as reported in Law Rep. 6 Eq. 91, were to be taken as part of the case.

The defendant failing to pay any of the said moneys, this action was brought. The contention on the part of the defendant was, that the alleged amalgamation and transfer were authorized neither by the articles of association of the Imperial Bank, nor, for want of sufficient notice, by the provisions of s. 161 (1) of the Com-

(1) "Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators, or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale of shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that, if any member of the company being wound up who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same expresses his dissent from any such special resolution in writing addressed

1870

BANK OF HINDUSTAN v. ALISON.

panies Act, 1862 (25 & 26 Vict. c. 89); that, even if the special resolution passed by the Imperial Bank at the meeting on the 25th of August, 1866, was not invalid from want of sufficient notice, the transaction was invalid, not being in pursuance of the powers conferred by or in accordance with the requirements of s. 161; that the Court of Chancery having set aside the agreement as invalid and inoperative, the contract, if any, between the plaintiffs and the defendant stood or fell with the amalgamation, and therefore had ceased and become void; that, even if the contract was valid as against the defendant, the Bank of Hindustan had not performed their part of the contract; and that, under the circumstances, the alleged shares allotted to the defendant were issued ultrà vires by the Bank of Hindustan, inasmuch as the alleged shares formed part of the increase of capital from 2,000,000*l.* to 4,000,000*l.*, which alleged increase of capital was not properly created under the provisions of the Companies Act, 1862, and the memorandum and articles of association of the company.

17. The plaintiffs contended that the defendant was liable; that, having applied for the shares, and having had them allotted to him according to such application, and paid moneys thereon, he was bound to carry out the engagement on which he took them; and that the facts shewed no repudiation or disavowal of the shares, and afforded no defence to the action.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover in this action any and what amount against the defendant.

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to the liquidators or one of them, and left at the registered office of the company not later than seven days after the date of the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things, as the liquidators may prefer, that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter [s. 162] mentioned, such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution: no special resolution shall be deemed invalid for the purposes of this section by reason that it is passed antecedently to or concurrently with any resolution for winding up the company, or for appointing liquidators; but, if an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court."

1870

BANK OF HINDUSTAN v. ALISON.

Brown, Q.C. (*Philbrick* with him), for the plaintiffs. The defendant was a party assenting to the amalgamation of the two banks. He applied for shares in the amalgamated company, accepted the allotment in 1865, assented to the transfer of so much of the capital of the Imperial Bank as belonged to him, and paid 5*l.* per share on account of the deposit: and he took no step to repudiate his liability until 1867, when the action was brought for the calls. He resists the payment of the calls on the ground that the agreement of amalgamation has been set aside at the instance of a non-assenting shareholder in the Imperial Bank. The effect of the decision of Vice-Chancellor Giffard in *Imperial Bank of China* v. *Bank of Hindustan* (1) is, that the amalgamation was ineffectual as against non-assenting, though it might be good as against assenting shareholders. The transaction was held to be ultrà vires, but not illegal. That decision must be assumed to be correct, there having been no appeal; and, indeed, the winding-up proceeds upon that assumption.

[BOVILL, C.J. The result of the decree is, that there was no amalgamation. It is left quite uncertain what is the real position of the assenting shareholders of the Imperial Bank.

WILLES, J. What is the effect of the decree of the Vice-Chancellor upon the payment of 5*l.* a share by the Imperial Bank? The Imperial Bank bargain that their shareholders shall have a preference in taking shares in the plaintiffs' bank, and be considered as paying 5*l.* per share, which was to be paid by the Imperial Bank. A portion of that payment, at all events, would have to be returned.]

The non-assenting shareholders would probably be entitled to have their 5*l.* per share paid back. A railway company incorporated by Act of parliament cannot, even with the assent of all its shareholders, legally enter into a contract involving the application of any portion of its funds to purposes foreign from those for which it is incorporated: *East Anglian Rys. Co.* v. *Eastern Counties Ry. Co.* (2) It is otherwise, however, as to banking companies. The memorandum and articles of association are equivalent to covenants binding the shareholders: 25 & 26 Vict. c. 89, ss. 11, 16.

[BOVILL, C.J. The difficulty here is that the directors of the

(1) Law Rep. 6 Eq. 91. (2) 11 C. B. 775; 21 L. J. (C.P.) 23.

1870

BANK OF HINDUSTAN v. ALISON.

Bank of Hindustan have issued shares which they had no authority to issue, their powers of raising capital having already been exhausted.]

They had power under the articles of association, as set out in par. 4 of the case, to amalgamate with or purchase the business of any other bank, and to issue additional shares for the purpose of paying the purchase-money.

[BOVILL, C.J. The decision of Vice-Chancellor Giffard is, that the plaintiffs have not purchased the business of the Imperial Bank. The dissentient shareholders of that bank had an interest in the whole of its capital.]

It is true that the attempt to amalgamate has not succeeded in its entirety; but, though it has failed as to dissentient shareholders, it does not follow that it is void as against those shareholders who assented to it. Quod fieri non debet factum valet. Having entered into the engagement to take shares with his eyes open, the defendant is estopped from denying his liability to the consequences. The facts which are relied on as constituting the estoppel are, the defendant's application for the shares, his acceptance of the allotment, and his abstaining from doing anything to repudiate or disclaim his liability when in 1865 three several calls were made upon him,—thus inducing the plaintiffs to believe and to act upon the belief that they might consider him a shareholder. That such conduct creates an estoppel is clear from *Campbell* v. *Fleming* (1); *Cheltenham and Great Western Union Ry. Co.* v. *Daniel* (2); *Sheffield and Manchester Ry. Co.* v. *Woodcock* (3); *West Cornwall Ry. Co.* v. *Mowatt* (4); and *Oakes* v. *Turquand.* (5) In *Hull Flax and Cotton Mill Co.* v. *Wellesley* (6), by the deed of settlement of a joint-stock company it was provided that the capital of the company should be 100,000*l.* in 1000 shares of 100*l.* each, and that it should be competent for any general meeting of the company to create additional shares of 100*l.* each. The company at a general meeting created 1500 new half shares of 50*l.* each, some of which the defendant purchased, executed the deed of settlement, and received the dividends declared on the shares. It was afterwards resolved

(1) 1 Ad. & E. 40.
(2) 2 Q. B. 281.
(3) 7 M. & W. 574.
(4) 15 Q. B. 521; 19 L. J. (Q.B.) 478.
(5) Law Rep. 2 H. L. 325.
(6) 6 H. & N. 38; 30 L. J. (Ex.) 5.

at a special general meeting that the company be wound up under the Joint Stock Companies Acts of 1856 and 1857, and the defendant was sued for calls made by the directors and liquidators: and it was held that he was estopped from denying that the 50*l.* shares were valid shares. "Whether," says Martin, B. (1), "we consider the case with reference to the calls made by the official liquidator in pursuance of the Act for winding up such bodies as this, or to the calls made by the company under the powers of their deed, the defendant who executed a deed whereby he expressly bound himself to pay calls on these shares, is estopped from setting up this answer, and is bound by his own contract to admit that the shares are good and valid."

[BOVILL, C.J. There, the defendant had derived a benefit from the shares.]

In *Re New Zealand Banking Corporation, Sewell's Case* (2), an allottee of shares the issue of which though originally ultrà vires was confirmed by subsequent resolutions of a general meeting, was held to be properly placed upon the list of contributories on the winding-up of the company.

[BOVILL, C.J. There was a valid act of ratification there. Mr. Sewell applied for the shares with full knowledge of the facts, and obtained what he considered a benefit; and, further, he received a dividend on the shares.]

So, here, the defendant obtained a benefit. He held the shares for a considerable time, and might have speculated with them. The plaintiffs could not have resisted a claim on his part for profits, if any had been made. In *Cairncross* v. *Lorimer* (3), Lord Campbell says that it is the doctrine of all civilized nations that, "if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

(1) 6 H. & N. at p. 54; 30 L. J. (Ex.) at p. 11.

(2) Law Rep. 3 Ch. Ap. 131.

(3) 3 Macq. 827, 829.

1870

BANK OF HINDUSTAN v. ALISON.

H. Lloyd, Q.C. (*W. G. Harrison* with him), contrà. The effect of the decision of Vice-Chancellor Giffard was, that the arrangement entered into between the two banks was one which it was not competent to them to carry out, and never was carried out. It could only be done under s. 161 of the Companies Act, 1862, which the Vice-Chancellor held had not been followed. The Bank of Hindustan consequently had no power to issue the shares in question. If liable at all, the defendant can only be made so by estoppel. The special case discloses no act done by him which can estop him. The estoppel, if any, therefore, must rest upon acquiescence and lapse of time. That mere lapse of time will not render one who has not executed the deed of settlement liable as a shareholder by estoppel, is clear from *Irish Peat Co.* v. *Phillips.* (1) In *Hull Flax and Cotton Mill Co.* v. *Wellesley* (2), the defendant had executed the deed and received dividends on the shares half-yearly for five years; and what was done did not at all alter the character of the thing. If all that is wanting to make the transaction valid and lawful is the consent of the party, he would no doubt be bound by his acquiescence expressed or implied. But here there is nothing to bring the case within the principle laid down by Lord Campbell in *Cairncross* v. *Lorimer* (3), or that stated by Lord Denman in *Pickard* v. *Sears* (4), that, "where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." If any laches have been committed here, it has been by the plaintiffs. The defendant was misled by their circular. Relying upon the statements contained therein, he applied for shares. He was not bound to do anything until sued for calls. In *Re Bahia and San Francisco Ry. Co.* (5), and *Hart* v. *Frontino Gold Mining Co.* (6), the defendants were clearly estopped by their unequivocal acts. *Re London and Northern Insurance Corporation, Stace and Worth's Case* (7), is

(1) 1 B. & S. 598; 30 L. J. (Q.B.) 363.
(2) 6 H. & N. 38; 30 L. J. (Ex.) 5.
(3) 3 Macq. at p. 829.
(4) 6 Ad. & E. 474.
(5) Law Rep. 3 Q. B. 584.
(6) Law Rep. 5 Ex. 111.
(7) Law Rep. 4 Ch. Ap. 682.

precisely in point, and indeed is even a stronger case than the present. By the articles of association of a company the directors were to be selected by the shareholders, and power was given to purchase the business of any other company. Power was also given by an extraordinary meeting of the company to amalgamate with any other company. An agreement was made for the amalgamation of this company with another company on the terms that the second-named company should sell their assets to the first-named company, that the directors of the amalgamated board should consist of the present five directors of the purchasing company and of seven of the directors of the selling company. This agreement was acted upon, but was never confirmed by an extraordinary meeting of the purchasing company. It was held by the Lords Justices (affirming the decree of Vice-Chancellor James), that the agreement was void, and that two of the *directors* of the selling company, who had been allotted shares in the purchasing company in exchange for shares in the selling company, and had acted as directors of the amalgamated company, were not liable to be put on the list of contributories of the purchasing company.

Brown, Q.C., in reply. *Hull Flax and Cotton Mill Co.* v. *Wellesley* (1), *Re New Zealand Banking Corporation, Sewell's Case* (2), and *Re Bahia and San Francisco Ry. Co.* (3), go the full length of shewing that the defendant may be estopped from denying that he is a shareholder, even though it be shewn that the shares were issued ultrà vires and could not legally have existed. To create an estoppel, it is not necessary that any actual benefit should have been received: the taking the chance of benefit is enough. In *Levita's Case* (4), cited in *Stace and Worth's Case* (5), Mr. Levita applied for shares in a company. No letter of allotment was sent to him, but his name was put upon the register in respect of those shares and advertised as a director. He attended a meeting of directors, and took no steps to have his name removed for two years: and he was held to be liable as a contributory in respect of those shares. *Clinch* v. *Financial Corporation* (6) is a further authority to shew that, though void as against non-assenting share-

(1) 6 H. & N. 38; 30 L. J. (Ex.) 5.
(2) Law Rep. 3 Ch. Ap. 131.
(3) Law Rep. 3 Q. B. 584.
(4) Law Rep. 3 Ch. Ap. 36.
(5) Law Rep. 4 Ch. Ap. 682.
(6) Law Rep. 4 Ch. Ap. 117.

1870

BANK OF HINDUSTAN v. ALISON.

holders, the amalgamation might still be good as against those who assented. Justice and reason require that the defendant in this case should be held to be estopped by his conduct from denying his liability for these calls.

BOVILL, C.J. It seems to me that there was no valid amalgamation of these two companies, either under the provisions of the articles of association of the plaintiffs' company or by virtue of s. 161 of the Companies Act, 1862. That point was expressly decided by the late Vice-Chancellor Giffard in the case of *Imperial Bank of China* v. *Bank of Hindustan* (1), where a decree was pronounced by which the attempted amalgamation was set aside; and that decree placed the defendants on that record, the Bank of Hindustan, in the same position, with regard to persons who had assented to become shareholders in their company, as that which they stood in before the proposal for amalgamation with the Imperial Bank. That was the result of the litigation in the Court of Chancery as between the Imperial Bank and the Bank of Hindustan; and I entirely concur in the reasons given for the judgment pronounced on that occasion. The nature of the agreement proposed was, that the two banks should be amalgamated, and that the holders of shares in the Imperial Bank might become shareholders in the Bank of Hindustan, the moneys which they had paid to the former bank being transferred to the latter, and treated as payments on account of the shares therein. The whole arrangement contemplated an amalgamation of the two banks. But, according to the view taken by the Vice-Chancellor, such amalgamation was not and could not be effected, and accordingly the whole foundation of the arrangement failed. A similar view as to what was the effect of an amalgamation not legally carried out was taken by Lord Cairns in *Clinch* v. *Financial Corporation* (2), where he says: "It was argued that a large number, in fact a majority, of the shareholders in the corporation had assented to the arrangement, and had actually taken shares in the bank under it, and that the plaintiff could not sustain this as a bill on behalf of himself and all other members of the corporation, or at all events not without making the others who had assented parties to the suit." "But," he proceeds to say,

(1) Law Rep. 6 Eq. 91. (2) Law Rep. 4 Ch. Ap. 117, 122.

1870

BANK OF HINDUSTAN v. ALISON.

"the contract was one between the two companies; and, if the contract was ultrà vires the corporation, it is a contract which in the eye of this Court it is for the benefit of all the shareholders in the corporation to arrest." In the opinion of those two learned judges, therefore, such an amalgamation as this can have no effect. With regard to the power of the company to raise additional capital, it is clear that, except for the purpose of amalgamation with another company, or of purchasing or acquiring the business of another company, they had no power to increase their capital beyond the additional sum provided by the memorandum of association, and which had already been raised. The proposed arrangement for acquiring the business of the Imperial Bank would, if carried out, have authorized a further increase of capital by the issue of new shares. The attempt to do so having proved abortive, the shares so created cannot be treated as valid shares. The 12th section of the Companies Act, 1862, expressly prohibits such increase of capital, as being contrary to the constitution of the company; and, as Lord Cairns says in *Re New Zealand Banking Corporation, Sewell's Case* (1), a transaction of that description cannot be sustained. It was contended, however, that there was in this case a purchase by the Bank of Hindustan of the shares of the defendant and the other assenting shareholders in the Imperial Bank. But I cannot think that that was the real character of the transaction, nor that the directors could in that way exercise the power of increasing their capital as upon the purchase or acquisition of the business of another company or amalgamation with it. The result is that, apart from the question of estoppel, the defendant never did in point of law become a shareholder in the Bank of Hindustan. It may be that he and the other assenting shareholders in the Imperial Bank may be entitled to receive back the whole or at least a portion of the money they have contributed towards the funds of the Bank of Hindustan, subject to the adjustment of any equities which may have been created between the parties. With that, however, we have nothing to do. This action is founded upon the fact of the plaintiff being a shareholder in the Bank of Hindustan; and it must be made out clearly that he is a shareholder in point of law before the action can be maintained.

(1) Law Rep. 3 Ch. Ap. 131.

1870

BANK OF HINDUSTAN v. ALISON.

But it was insisted that, assuming that the defendant was not an actual shareholder, he has by his acts or conduct estopped himself from denying that he is a shareholder. Several authorities were referred to and principles relied on in support of that proposition. The strongest for the purpose were the cases of *Hull Flax and Cotton Mill Co.* v. *Wellesley* (1) and *Sewell's Case.* (2) In the former, the Court held that the defendant was estopped from denying that he was a shareholder,—first, because he had executed the deed of settlement, which authorized the creation of the shares,—and, secondly, because he had for five years constantly received a dividend on the shares which he held. Under these circumstances, having bound himself by his execution of the deed, and having accepted a benefit, it was properly held that he had estopped himself from denying that he was a holder of valid shares. That, therefore, is a very different case from the present. In the case of *Re New Zealand Banking Corporation, Sewell's Case* (2), the directors of a company whose capital was 300,000*l.* divided into 3000 shares of 100*l.* each, made an unauthorized issue of 1000 additional shares beyond their capital. They afterwards called general meetings, at which resolutions were passed to increase the capital to 600,000*l.*, to be divided into 60,000 shares of 10*l.* each: and it was held that the issue of the 1000 shares, although originally ultrà vires, was confirmed by the resolutions, and that the allottees of those shares were bound by the resolutions, and were rightly placed on the list of contributories in the winding-up of the company. The ground upon which the decision proceeded was that Mr. Sewell and the other shareholders were parties to the resolution ratifying what had been done. I find nothing of the kind in the present case. There was another case referred to at the conclusion of the argument, viz. *Re London and Northern Insurance Co., Stace and Worth's Case* (3), which strongly confirms this view. It is true the circumstances of the two cases are not precisely similar; for, there was no application for shares there, as there was here. Two of the directors under an attempted amalgamation which turned out not to be valid had attended meetings and acted as if they were shareholders: the Court held, that, the amalgama-

(1) 6 H. & N. 38; 30 L. J. (Ex.) 5. (2) Law Rep. 3 Ch. Ap. 131.
(3) Law Rep. 4 Ch. Ap. 682.

tion being void, and there being no separate agreement by the defendants to become shareholders independently of the amalgamation, there was nothing to fix them with liability as shareholders.

In the present case it was strongly contended that the conduct of the defendant estopped him from denying that he was a shareholder of the Bank of Hindustan. Looking, however, to all the circumstances, it is clear to my mind that all that was done, or omitted to be done, on either side, was the result of mere mistake. There was no misleading of the plaintiffs by the defendant into a belief of the existence of a state of facts which did not exist. Both parties were equally mistaken in supposing that a complete and legal amalgamation had taken place. If either party induced a belief in the mind of the other that the two banks had been properly amalgamated, it was the plaintiffs rather than the defendant. The plaintiffs appear to have acted on their own view of the law and the facts, and not upon any representation or conduct of the defendants.

Upon the whole, it seems to me that the defendant is not liable as a shareholder in point of law; nor is there any ground for saying that he has by his conduct estopped himself from denying that he was a shareholder. I therefore think our judgment ought to be for the defendant.

WILLES, J. I am entirely of the same opinion. The 10th paragraph of the special case sets out the contract between the parties under which the plaintiffs allege that the defendant became liable to pay the calls in question. It is only necessary to look at that contract, and to give it the ordinary interpretation which any man of business would put upon it, to see that under the circumstances the defendant has not become liable for these calls. The plaintiffs, however, contend that, whether the defendant was liable or not under the contract which he entered into, he has at all events by his subsequent conduct disentitled himself to say that the contract was invalid for the reasons alleged, or, rather, has estopped himself from saying that he was not a shareholder. It is a somewhat inaccurate expression; but in this case no other expression sufficiently represents the contention on the plaintiffs' part.

1870

BANK OF HINDUSTAN v. ALISON.

The contract is founded, so far as relates to the taking of the shares by the defendant, upon the circular sent out by the plaintiffs on the 15th of September, 1864, and the application by the defendant for an allotment of shares, assented to by the plaintiffs. That circular states, in the language, not of the defendant, but of the plaintiffs, that, in right of his being a registered holder of shares in the Imperial Bank of India, the defendant is entitled under the terms of arrangement entered into between the two companies to an allotment of a like number of shares in the Bank of Hindustan at 6*l.* per share premium, by virtue of which the directors of the Imperial Bank of China had paid on his account to the Bank of Hindustan a certain sum, being 5*l.* per share, on account of the deposit to be paid thereon; and that, to entitle him to that option, he must sign the inclosed form, and transmit the same to the Bank of Hindustan on or before a given day. Nothing, therefore, can be more plain than the plaintiffs' representation to the defendant that he was entitled to the privilege of taking certain shares in their bank at 6*l.* premium; and that, though the deposit on such shares was 10*l.*, he was only to pay 5*l.*, because 5*l.* per share had already been paid on his account under an arrangement with the Imperial Bank. If language has any meaning, that language means that the arrangement which had been entered into by the Bank of Hindustan with the Imperial Bank of China was a valid and binding arrangement which each of the contracting parties was competent to make, and which would insure the defendant shares in respect of which a deposit to the extent of 5*l.* per share had been paid on his account by some other person. The defendant accepts the offer in the same spirit. He writes, "As a registered holder of five shares in the Imperial Bank of China, I hereby claim the privilege I am entitled to, of becoming a shareholder in the Bank of Hindustan, to the extent of the same number of shares I hold in such bank; and, having caused to be paid to your bank the sum of 25*l.*, being 5*l.* per share, on account of deposit on such five shares, I hereby request that you will allot me that number; and I authorize you to place my name upon the register of members of your company for the same; and I agree to pay the sum of 30*l.*, being 5*l.* per share, the balance of the deposit of 10*l.* per share, and 1*l.* per share

on account of premium, on the 12th of October next; and I further agree to pay the further sum of 25*l.*, being 5*l.* per share, the balance of 6*l.* per share on account of premium, on the 12th of January, 1865." The character of that transaction is that, 5*l.* per share having been paid on account of the deposit, the defendant is satisfied to take shares in the plaintiffs' bank in respect of which the 5*l.* per share had been paid on his account. Did he thereby agree to accept shares in respect of which no part of the deposit had been paid on his account? It is obvious that he did not by his letter of application assent to take shares in respect of which 5*l.* per share had not been paid. The effect of the decision of Vice-Chancellor Giffard, in *Imperial Bank of China* v. *Bank of Hindustan* (1), holding the amalgamation to be void, was, to shew that 5*l.* per share had not been paid on account of the defendant. If he were held to be a shareholder in the plaintiffs' company, he would either be a shareholder liable to be called upon to pay 5*l.* per share more than he had agreed to pay, which would be unjust to him, or he would be a holder of shares upon which that 5*l.* had not been paid at all, which would be unfair to the original shareholders in the plaintiffs' bank. Neither party entered into any such agreement. It is obvious that the defendant had not by the arrangement,—I cannot call it a contract,—as it stood when the application for shares was made and assented to, become a shareholder in the Bank of Hindustan, because the parties had not agreed as to the terms upon which he was to become a shareholder. Mr. Brown very ingeniously suggested that, quite apart from all question as to the validity of the arrangement between the two banks, there was at all events a valid agreement between the plaintiffs and such of the shareholders of the Imperial Bank of China as had assented to become shareholders in the Bank of Hindustan in the way proposed, that their share of the business of the Imperial Bank of China should be purchased by the Bank of Hindustan; and that this might be a valid purchase as to them, though not so as to bind non-assenting shareholders of the Imperial Bank. That argument, however plausible it might seem at first sight, is founded upon an entire misapprehension of the nature of the interest which a shareholder has in a joint-stock company. His interest is not an interest in the real or

(1) Law Rep. 6 Eq. 91.

1870

BANK OF HINDUSTAN v. ALISON.

personal property of the company, including its business or goodwill; but it is merely a right to have a share of the profits of the company when realized and divided amongst its members. He has no right to sell any part of the property which belongs to the company as an undertaking. It is an abuse of language and a mistake to talk of buying and selling so much of the business of the bank as is represented by the interest therein possessed by the assenting shareholders. The business of the company is an entirety. The proposed arrangement between the Bank of Hindustan and the Imperial Bank of China had for its object the passing of that entirety; and, that having failed, as Vice-Chancellor Giffard in his judgment shews in the shortest and clearest possible manner that it did, the whole arrangement failed. In that judgment I entirely concur. What I have ventured to throw out was evidently passing in the mind of that most learned judge, though he did not think it necessary to state his views at large. It is a mere fallacy to suppose that there was any purchase of the business or any part of the business of the Imperial Bank of China. That removes the argument which was founded upon the 101st clause of the articles of association of the Bank of Hindustan, so far as the transaction rests on the purchase of the business of the Imperial Bank of China, notwithstanding the attempted amalgamation turned out to be unavailing.

This brings one at once to the question of estoppel. Has the defendant,—to use the language of Vice-Chancellor Giffard,—chosen to become a shareholder in the Bank of Hindustan? I may at once dispose of that question by saying that he has not so chosen, because his application for the shares was made, not only without a knowledge of the facts,—with such an ignorance of the facts on his part as would constitute an entire mistake as to the subject-matter of the contract,—but with either a corresponding ignorance on the part of the plaintiffs' bank, or with a knowledge that the circumstances were otherwise than their directors represented in the circular to which I have already drawn attention. I will assume that there was no fraud. The other alternative is that both parties were mistaken as to that about which they were contracting; that the plaintiffs honestly meant to sell shares to which was annexed a certain privilege to be obtained by

means of money advanced by the Imperial Bank of China; and that the defendant was satisfied to take shares with that privilege. It now appears that he cannot have shares with that privilege. He is, therefore, not bound by his contract, and the money advanced by the Imperial Bank of China must be restored to them. Another sort of estoppel is sought to be raised, by reason of the plaintiffs having been induced by the conduct of the defendant to alter their position. When challenged to shew how the plaintiffs had altered their position in consequence of the defendant's conduct, Mr. Brown said the bank might, upon the faith of the defendant and the others having become shareholders, have entered into large engagements which they would not otherwise have entered into. I find nothing in the special case to lead me in point of fact to that conclusion: and, if it were so, it would be necessary to shew that the plaintiffs had been led to adopt such a course by the conduct of the defendant. I think it might be said more justly that the plaintiffs are the wolf and the defendant the lamb. It was the plaintiffs who led the defendant into the mistake of supposing that he had valid shares in their bank. It was they who held out to him the inducement to become a shareholder. It was they who muddied the sources of information, by intimating to the defendant that he might get shares on the advantageous terms they represented. It seems to me to have been a clear case of mistake on both sides. The plaintiffs have failed in their attempt to introduce the defendant as a shareholder in their bank, because they were unable to carry out the conditions upon which the defendant consented to become a shareholder. The amalgamation or purchase of the business of the Imperial Bank of China having fallen to the ground, the plaintiffs' right to treat the defendant as a shareholder in their bank also falls.

KEATING, J. I am entirely of the same opinion. This action for calls cannot be maintained unless the defendant is a shareholder in point of fact, or has estopped himself from saying that he is not a shareholder. Was he in fact a shareholder? A shareholder is a holder of shares. In the present case, the shares were to be created by virtue of an arrangement in the nature of an amalgamation of the plaintiffs' bank with the Imperial Bank of

1870

BANK OF HINDUSTAN v. ALISON.

China, which amalgamation was never carried into effect. It seems to me that upon that short ground the defendant never was a shareholder in point of fact in the plaintiffs' company. But, though not a shareholder in point of fact, a person may, no doubt, by his conduct or his representations estop himself from denying that he is so. Now, what are the grounds upon which it is suggested that the defendant is estopped in this case? All that I could collect from Mr. Brown's argument was, that the defendant had estopped himself by having applied for shares, having paid the deposit of 5*l.* and 1*l.* per share, and having received notice that calls were due without making any objection. He did, no doubt, apply for shares; but he did so in consequence of that which turns out to have been a misrepresentation by the plaintiffs of the facts,—not a wilful misrepresentation with intent to mislead or defraud the defendant; but a statement that an amalgamation had taken place which in point of fact and of law had not taken place and could not take place. To say that the defendant's acting upon a representation so made to him can form the foundation of an estoppel does appear to me to be a strong proposition. I am clearly of opinion that it created no estoppel; nor does it derive any additional force by reason of the defendant's failure to take notice of or pay calls for which he was not liable. I agree with my Lord and my Brother Willes that the defendant is entitled to judgment.

BRETT, J. Mr. Brown argued in the first place that the defendant was a shareholder because the directors had a right to allot shares to him and he had accepted them. Without saying whether or not I agree with the argument of Mr. Lloyd that the bank could not have issued shares, for the purpose of a valid amalgamation, beyond the 2,000,000*l.* they were otherwise entitled to raise, I think the decision of the Court of Chancery that they were not authorized by the 101st article of their articles of association to issue these shares was right; and it was not contended that they had any such power under s. 161 of the Companies Act, 1862. The directors, therefore, had no power to issue the shares; and, no shares having been legally created, it is impossible to say that the defendant was a shareholder. Mr. Brown then insisted that the

defendant was estopped from denying that he was a shareholder. First, he said the defendant was estopped because he had received a benefit; but the only benefit suggested was that he had the power of speculating with these void shares! Then it was said that the defendant had so conducted himself as to entitle the plaintiffs to assume that he was a shareholder, and to act upon that assumption. Supposing the defendant did so conduct himself as to entitle the plaintiffs to act upon the faith of his conduct to their own detriment, the argument fails, because upon the facts it does not appear that the plaintiffs did upon the faith of any conduct on the part of the defendant act in a way detrimental to their own interests. They acted entirely upon their own mistaken view of the facts and the law. I agree with the rest of the Court that the plaintiffs' argument fails upon both points, and therefore there must be judgment for the defendant.

Judgment for the defendant.

Attorneys for plaintiffs: *Ashurst, Morris, & Co.*
Attorney for defendant: *A. Pulbrook.*

END OF MICHAELMAS TERM, 1870.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

HILARY TERM, XXXIV VICTORIA.

1871
Jan. 27.

WHINCUP *v.* HUGHES (Executrix).

Apprenticeship—Death of Master during Term—Return of Premium—Failure of Consideration—Money had and received.

The plaintiff apprenticed his son to a watchmaker and jeweller for the term of six years, paying to the master a premium of 25*l*. The master duly instructed the apprentice for a year, and then died. The plaintiff sought, in an action against the master's executrix for money had and received, to recover the whole or some part of the premium, on the ground of failure of consideration:—

Held, that such failure being only partial, the action was not maintainable.

Hirst v. *Tolson* (2 Mac. & G. 134; 19 L. J. (Ch.) 441) discussed.

Action in the Salford Hundred Court against the defendant as executrix of Thomas Rogers Hughes, deceased.

The first count of the declaration stated that the testator covenanted with the plaintiff to instruct one George Whincup, the younger, during the term of six years, from the 31st of July, 1868, in the business of a watchmaker and jeweller. Breach, that he did not so instruct him.

Second count, for money had and received by the testator for the use of the plaintiff, and for money had and received by the defendant as executrix, for the use of the plaintiff.

Third plea (inter alia) to the first count, that after the making of the said covenant, and after the said Thomas Rogers Hughes had for the space of twelve months instructed the said George Whincup, the younger, in his said business according to his said covenant, the said Thomas Rogers Hughes died, and was thereby prevented from any further performance of his said covenant.

To the rest of the declaration, never indebted.

Issues and demurrer to third plea.

At the trial the facts appeared to be as follows:—The plaintiff had apprenticed his son to the defendant's testator, a watchmaker and jeweller, by a deed bearing date the 26th of November, 1868, for the term of six years, to be computed from the preceding 31st of July. The plaintiff covenanted to pay a premium of 25*l.* to the master, and provide the apprentice with food and clothing during the term, in consideration whereof the master covenanted with the plaintiff to instruct the apprentice in his business, and to pay him wages according to an ascending scale, commencing at 4*s.* per week during the first year, and ending at 10*s.* per week in the last year of the term. The plaintiff paid the premium, and the apprentice was duly instructed up to the 14th of November, 1869, when the defendant's testator died.

The learned judge, upon these facts, held that the covenant to instruct the apprentice was a merely personal covenant, which was put an end to by the testator's death, and that the plaintiff could not, therefore, recover on the first count; but he held that the plaintiff might recover a part of the premium paid under the common counts, on the ground of failure of consideration. The verdict was thereupon entered for the plaintiff for the sum of 15*l.*, the amount found by the judge, to whom the question of amount was left by consent; leave being reserved to the defendant to move to enter a nonsuit, on the ground that neither the premium paid at the commencement of the apprenticeship, nor any part of it, was recoverable back, the consideration for its payment not having failed, either wholly or as to any apportionable part.

A rule nisi had been accordingly obtained, against which

J. W. Mellor shewed cause. Part of the premium can be recovered back on the ground of the failure of consideration. No

1871

WHINCUP v. HUGHES.

doubt the apportionment is difficult, but it is capable of being made with substantial accuracy. The Court in the case of attorneys will apportion the premium: *Ex parte Prankerd* (1); *Ex parte Bayley* (2) These were cases, it is true, of the exercise of the summary jurisdiction of the Court over its own officers, but in the case of *Hirst* v. *Tolson* (3) the judgment was based on general principle, quite irrespective of the fact of the case being that of an attorney, and is in favour of the maintenance of this action. See also the case of *Atwood* v. *Maude*. (4)

[BOVILL, C.J. That was not a case of death; the question arose on a bill praying for a dissolution of partnership with reference to the terms on which such dissolution should take place.

MONTAGUE SMITH, J. If the apprentice died the master could get no compensation for loss of service. Do not both parties take their chance?]

He also cited *Astle* v. *Wright* (5); *Cooper* v. *Simmons*. (6)

G. B. Hughes supported the rule. *Hirst* v. *Tolson* (3) is the case of an attorney's clerk, and the Lord Chancellor's attention does not seem to have been directed to the decisions at law with reference to partial failure of consideration. The authorities relied on in his judgment certainly do not support the proposition that under such circumstances as the present a part of the premium becomes a debt at law. It is laid down in 1 Chitty on Pleadings, 7th ed. p. 367, that the count for money had and received is not maintainable if a contract has been in part performed. See also Chitty on Contracts, 8th ed. p. 577; *Hunt* v. *Silk* (7), *Blackburn* v. *Smith* (8), and the decisions with regard to return of premiums in cases of marine insurance: Park on Marine Insurance, 8th ed. p. 785. There is not a single instance of an action at law to recover part of the premium in the case of an ordinary apprentice.

[BOVILL, C.J., referred to the case of *Craven* v. *Stubbins* (9), and the 33rd section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71).]

(1) 3 B. & A. 257.
(2) 9 B. & C. 691.
(3) 2 Mac. & G. 134; 19 L. J. (Ch.) 441.
(4) Law Rep. 3 Ch. 369.
(5) 23 Beav. 77; 25 L. J. (Ch.) 864.
(6) 7 H. & N. 707; 31 L. J. (M.C.) 138.
(7) 5 East, 449.
(8) 2 Ex. 783; 18 L. J. (Ex.) 187.
(9) 34 L. J. (Ch.) 126.

(5 K 2 Jur N.S. 849.

1871

WHINCUP v. HUGHES.

BOVILL, C.J. This is an action brought to recover a part of the premium paid upon the execution of an apprenticeship deed, on the ground of failure of consideration. The general rule of law is, that where a contract has been in part performed no part of the money paid under such contract can be recovered back. There may be some cases of partial performance which form exceptions to this rule, as, for instance, if there were a contract to deliver ten sacks of wheat and six only were delivered, the price of the remaining four might be recovered back. But there the consideration is clearly severable. The general rule being what I have stated, is there anything in the present case to take it out of such rule? The master instructed the apprentice under the deed for the period of a year, and then died. It is clear law that the contract being one of a personal nature, the death of the master, in the absence of any stipulation to the contrary, puts an end to it for the future. The further performance of it has been prevented by the act of God, and there is thus no breach of contract upon which any action will lie against the executor. That being so, can any action be maintained otherwise than upon the contract? The contract having been in part performed, it would seem that the general rule must apply unless the consideration be in its nature apportionable. I am at a loss to see on what principle such apportionment could be made. It could not properly be made with reference to the proportion which the period during which the apprentice was instructed bears to the whole term. In the early part of the term the teaching would be most onerous, and the services of the apprentice of little value; as time went on his services would probably be worth more, and he would require less teaching. There appears to be no instance of a similar nature to the present in which an action for the return of a part of the premium has been brought. There have been attempts to recover part of the premium in the case of articled clerks. In *Ex parte Bayley* (1) which has been cited, the decision was not put on the ground of legal liability, but of the authority exercised by the Court over one of its own officers. In the case of *Re Thompson* (2), than which a stronger case could hardly exist, inasmuch as there the clerk died within a month after a premium of over 200*l.*

(1) 9 B. & C. 691.

(2) 1 Ex. 864.

1871

WHINCUP v. HUGHES.

was paid, an application was made to the Court in the exercise of its summary jurisdiction, but they declined to order the return of any part of the premium. It was assumed in that case that no action at law could lie, for otherwise the application would have been unnecessary. Thus it appears that even on application to the extraordinary jurisdiction of the Court over its own officer, the Court of Exchequer deliberately came to the conclusion that neither in law nor in justice was there any right under such circumstances to a return of premium. With regard to the justice of such a case, it is clear that it would be almost impossible to estimate what the master might on his side have lost by the loss of the service of the apprentice. Again, the person receiving the premium naturally assumes that it becomes his property to be dealt with as he pleases; he is perfectly ready to perform his part of the contract; he never undertakes to return any part of the premium, and the necessity for such return is never contemplated. We have been pressed with the authority of the case of *Hirst* v. *Tolson* (1), where an attorney having died, the Lord Chancellor ordered the return of a part of the premium paid by an articled clerk. But this decision expressly proceeded on the supposition that such part of the premium would be a debt in law, although the Lord Chancellor came to the conclusion that under the circumstances it was not necessary to send the plaintiff to seek a remedy in a court of law, but he might recover in equity. The Lord Chancellor refers to the case of *Stokes* v. *Twitchin* (2) as establishing the principle that where there is such a partial failure of consideration, an action is maintainable. On referring to that case it appears that it is no authority for any such proposition. In that case the indenture was void for breach of the provisions of a statute. The plaintiff claimed the whole premium back on the ground of total failure of consideration. There is no doubt that money had and received will lie upon such a failure of consideration, though the plaintiff failed in that case on the ground that he was himself party to the illegality.

With regard to the equity of the case, the Lord Chancellor refers to two former decisions in the time of Vernon and Finch,

(1) 2 Mac. & G. 134; 19 L. J. (Ch.) 441.
(2) 8 Taunt. 492.

which appear to be *Soam* v. *Bowden* (1) and *Newton* v. *Rouse* (2). On referring to the report of the former case in Finch, it appears that there the master had received a premium of 250*l.* and died within two years, and a bill having been filed against the executors for the return of a portion of the premium, it is stated that the executors said that they would be willing to do whatever the Court should direct in the matter. It is quite consistent with this report that the executors really did not contest the point, but submitted to what the Court might, under the circumstances, think just. The case of *Newton* v. *Rouse* (2) is certainly a very remarkable case, because there the agreement contained an express provision that in case of death 60*l.* should be returned, and on a bill being filed, the Court decreed the return of 100*l.* This is certainly wholly inconsistent with the principles regulating the interpretation of contracts both at law and equity. The only possible ground on which the decision can be explained is that mentioned by the note to the case in the 3rd ed. of Vernon, by Mr. Raithby, and referred to in 1 Story's Equity Jurisprudence, 10th ed. p. 472, viz., that it must have been a case of mutual mistake, misrepresentation, or unconscientious advantage taken by one side of the other. Under these circumstances, it does not appear to me that the case of *Hirst* v. *Tolson* (3) is a satisfactory authority or one by which we are bound. It appears to be based on a misapprehension of the law on the subject, and is distinctly contrary to the opinion of the Court of Exchequer in *Re Thompson* (4). For these reasons I think the rule ought to be made absolute.

WILLES, J. I am of the same opinion. We have no jurisdiction to override the intention of the parties as expressed in the contract of apprenticeship. The effect of that contract is clear. In consideration of the premium the master undertakes to teach, and the apprentice undertakes to serve for a period of six years if they both shall live so long. If this, which is the true legal construction of this contract, were set out in so many words, it would

(1) Finch, 396.
(2) 1 Vern. 460.
(3) 2 Mac. & G. 134; 19 L. J. (Ch.) 441.
(4) 1 Ex. 864.

1871

WHINCUP v. HUGHES.

seem extraordinary that there should be any claim for a repayment of premium on the death of either of the parties. But it is a well-known rule of law that every contract must be construed as if those terms which the law will imply were expressly introduced into it. Such being the contract, if the apprentice died, could the master be called upon to refund any part of the premium? No suggestion to that effect was made. Then why should there be any difference in case of the master's death? In some particular cases there might be a reason. There might be a custom in relation to the subject. No suggestion is made of any such custom here, but in 2 Williams on Executors, 6th ed. p. 1631, a custom in London is mentioned, that in such a case the executors shall get the apprentice transferred to some other master of the same trade. In such a case, however, the action must be on the custom, not for money received.

The decision in the case of *Hirst* v. *Tolson* (1) does not appear satisfactory, for the reasons given by my Lord. With the utmost respect to the authority of the eminent Chancellor who decided it, with regard to the question of equity, I must confess that the justice of that decision appears to me very doubtful. The executors there seem to have offered to get the clerk placed in the office of another attorney without premium, and that having been declined they were made to refund money which the testator had probably spent long before his death without ever contemplating the necessity of refunding it. I must say that the doctrine of the common law which, except in the instance of the paternal or masterful jurisdiction of the Court over its own officers, does not compel any return on the partial failure of consideration, appears to me on the whole preferable to an equity so doubtful as this. In 1 Williams' Saunders, p. 313, the case of an apprentice running away is mentioned, and *Cuff* v. *Brown* (2) is referred to, where in such a case the master having refused to take back the apprentice, the Court held that it could not order any return of premium. It is there stated that in the case of an attorney's clerk the Court of King's Bench decided otherwise, considering that they had a more extensive authority, and the cases of *Ex parte Prankerd* (3) and

(1) 2 Mac. & G. 134; 19 L. J. (Ch.) 441.
(2) 5 Price, 297.
(3) 3 B. & A. 257.

Ex parte Bayley (1) are referred to as instances. In 2 Williams on Executors, 6th ed. p. 1631, the case of *Hirst* v. *Tolson* (2) is treated as applicable to attorneys only, and being an exercise of the equitable jurisdiction of the Court of Chancery.

MONTAGUE SMITH, J. I am of the same opinion. Independently of the rule of law, that an action for money had and received can only be brought when there is a total failure of consideration, with the exception of a few cases which, on being analyzed, hardly prove to be exceptions, I think this case is clear as a question of intention between the parties. The contract is a written one, and if on a consideration of its terms we should come to the conclusion that the parties did not mean that in case of death there should be a return of the premium, the defendant will, of course, not be liable. The contract is, that in consideration of 25*l.* paid at the time of its execution, the master will teach for six years; and the contract is subject to an implied condition that both parties should so long live, for, being a mere personal undertaking, it is only in such case that it can be performed. Now, I cannot imply from such a contract that the parties meant that in case of death, any part of the premium should be returned. If they had so meant there would have been no difficulty in expressly providing for such a contingency. We should, I think, be doing violence to the terms of the instrument if, as a presumption of law or fact, we added any such condition. The parties must be taken to have considered the possibility that one of them might die. In the case of the apprentice's death, or permanent illness during the later years of the term, the loss to the master might be considerable; might be even of greater value than the premium, for the services form a considerable part of the consideration for the master's contract. The master in such case could recover no compensation for his loss: see *Boast* v. *Firth*. (3) Under these circumstances, it seems to me that the parties, if they intended that there should be any return of premium, would have provided for it. Moreover, it appears to me clear that the action for money received cannot lie where the contract has been partly performed

(1) 9 B. & C. 691. (2) 2 Mac. & G. 134; 19 L. J. (Ch.) 441.
(3) Law Rep. 4 C. P. 1.

1871

WHINCUP v. HUGHES.

on both sides. To ascertain the amount, which equity in such a case requires to be returned, it would be necessary to go into a great variety of considerations, the relative weight of which it would be almost impossible correctly to estimate: e.g., the value of the service lost to the master, and the degree to which the apprentice had profited by the instruction. It would be impossible to take merely the proportion of the time which had elapsed to the whole term as the standard of measurement. My Lord and my Brother Willes have gone so fully into the authorities that I need say nothing further about them, except that the mere fact that, while similar cases to the present must be of such frequent occurrence, no case of an attempt to recover back part of the premium is to be found in the books, except with respect to an articled clerk, is of itself an authority against the plaintiff.

BRETT, J. I am of the same opinion, and to my mind the case is very clear. By the contract a specific sum is paid to the testator in respect of a continuing consideration, viz., a personal duty to be performed for six years if both parties should live so long. There is no express stipulation for any return of the premium or any part of it. The death of the testator is no breach of the contract, and the question therefore is, whether, there being no breach on his part, his executors can be made to return the premium or any part of it. Now the case cannot be brought within the rule of law relating to total failure of consideration, or mutual rescission of a contract. It comes within the rule that where a sum of money has been paid for an entire consideration, and there is only a partial failure of consideration, neither the whole nor any part of such sum can be recovered. No authority has been cited in favour of the plaintiff at common law. I express no opinion as to the decisions in equity that have been cited, inasmuch as we are not now exercising an equitable jurisdiction, and, therefore, they do not appear to me applicable. The decisions with regard to articled clerks seem to be strong authorities for the defendant, inasmuch as even when the Court did interfere to compel a return of the premium, they felt obliged to justify the strong measure of exercising jurisdiction to modify the contract of the parties, by

saying that they did so in the exercise only of their authority over their own officer.

1871

WHINCUP v. HUGHES

Rule absolute.

Attorney for plaintiff: *Burton, for Bent, Manchester.*
Attorney for defendant: *Holcombe, for Jones, Manchester.*

SIMPSON, APPELLANT; SMITH, RESPONDENT.

Jan. 26.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—"*General Line of Buildings*"—*Certificate of Superintending Architect, Effect of.*

In a proceeding before a magistrate under the Metropolis Management Amendment Act, 1862, s. 75, for erecting a building without the consent of the Metropolitan Board of Works, beyond the general line of buildings in a street, the certificate of the superintending architect of such board is not absolutely conclusive, but the magistrate is entitled to judge for himself whether the line fixed by such certificate be in fact the general line of buildings in the street:—

St. George, Hanover Square v. *Sparrow* (16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118) followed.

Bauman v. *Vestry of St. Pancras* (Law Rep. 2 Q.B. 528) discussed.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43.

On the 21st of October, 1869, complaint was made to the magistrate by the respondent, on behalf of the vestry of the parish of St. George, Hanover Square, for that the appellant, on the 10th of August, 1869, in the said parish, did erect a certain erection, to wit, a bay window, without the consent in writing of the Metropolitan Board of Works, beyond the general line of buildings in a certain street called Stratton Street, in the parish, the distance of such line of buildings not exceeding fifty feet from the highway, contrary to the statute in such case made and provided.

A summons was issued against the appellant, and on the hearing the following facts were proved before the magistrate: The defendant did, on the 10th of August, 1869, on certain premises situate on the west side of Stratton Street, erect a bay window without the consent in writing of the Metropolitan Board of Works, such consent having been applied for by the appellant and refused. The superintending architect to the Metropolitan Board of Works had,

1871

SIMPSON v. SMITH.

pursuant to the Metropolis Management Amendment Act, 1862, by his certificate bearing date the 5th of October, 1869, decided the general line of buildings on the west side of Stratton Street. The distance of the general line of buildings so decided, from the highway, did not exceed fifty feet, and the bay window was beyond the general line of buildings so decided. The magistrate, considering himself bound by the decision in the case of *Bauman* v. *Vestry of St. Pancras* (1) to act on the superintending architect's certificate, decided, accordingly, against the appellant. The question submitted for the decision of the Court was, whether the magistrate was right in determining the complaint on the decision of the superintending architect as to the general line of buildings. If the Court were of opinion in the negative, the case was to be remitted back to the magistrate to decide the general line of buildings so decided as aforesaid: if in the affirmative, his determination was to stand. (2)

(1) Law Rep. 2 Q. B. 528.

(2) The 25 & 26 Vict. c. 102, s. 75, after repealing s. 143 of 18 & 19 Vict. c. 120, and s. 140 of 7 Geo. 4, c. 142, enacts that "No building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; And in case any building, structure, or erection be erected, or be begun to be erected or raised without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish, or the board of works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons, to answer such complaint; and if at the time and place appointed in such summons, the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justices shall consider reasonable." The section then provides that in the event of the order not being obeyed, the vestry or board may enter and demolish the building, &c.

1871

SIMPSON v. SMITH.

Field, Q.C. (*Thesiger* with him), for the appellant. The question is, whether the architect's certificate is conclusive, or whether the magistrate is entitled to decide for himself, as to the general line of buildings. The magistrate appears, in the present case, to have thought that question decided by the judgment in *Bauman* v. *Vestry of St. Pancras.* (1) The point really did not arise in that case, the only question being, whether the certificate was given in time to give the magistrate jurisdiction. The decision of this Court in *St. George, Hanover Square* v. *Sparrow* (2), is distinctly in point, and is in the appellant's favour. See also the case of *Wandsworth Board of Works* v. *Hall.* (3)

[BOVILL, C.J. Under the law, as it stood before this Act, what was the regular line of building was a question of fact for a jury. The present Act substitutes a magistrate as the tribunal.]

It can never have been intended to reduce him to the position of being bound merely to see whether the direction of the architect is carried out. The architect's certificate is provided for the information of the board themselves, and as primâ facie evidence of the general line of buildings. Of course, if the certificate be in favour of the party building, no question arises for the magistrate's decision. The certificate raises an issue between the parties, which he is to decide.

[BOVILL, C.J. The magistrate is to order so much of the building to be pulled down as is "beyond the said general line, so fixed as aforesaid."]

The legislature may well have considered it unnecessary that any part should be pulled down beyond the line which is fixed by the architect, and put forward by the board as being the proper line of buildings. It has been decided that the certificate is not to be given at a certain time, once for all, but with reference to the particular building in question, and that it may be given at any time up to the hearing, and so after the building has been erected: see *Bauman* v. *Vestry of St. Pancras* (1), and *Wandsworth Board of Works* v. *Hall.* (3) That being so, the line may be fixed at different times, by different surveyors, and their decisions may vary. There must be some general line in fact, before the section

(1) Law Rep. 2 Q. B. 528.

(2) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118. (3) Law Rep. 4 C. P. 85.

10 Jan. 1871

1871

SIMPSON v. SMITH.

can apply, or an offence be committed. It would be monstrous to say that the architects' decision, which may be given ex post facto and without hearing the parties, can be conclusive as to what that line was.

[MONTAGUE SMITH, J. Suppose the magistrate's decision to be more favourable to the party building than the architect's, up to what line is the magistrate to order the building to be pulled down? The statute does not seem to contemplate any other line than that fixed by the architect.]

If by the terms of the section the decision of the architect may be modified in favour of the party who has erected the building, the line "so fixed as aforesaid" would in case of such modification be the line fixed on by the magistrate. He also cited *Tear* v. *Freebody*. (1)

Huddleston, Q.C. (*Streeten* with him), for the respondent. The question must be decided according to the plain words of the Act irrespective of considerations of possible hardship. The words are "*such* general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being." That is the line with reference to which the building is made an offence, the complaint is to be made and the order of the magistrate thereupon is to proceed. There is nothing unreasonable in such a provision. If the person intending to build chooses to apply for consent to the Metropolitan Board of Works, which it must be presumed they will grant if it be reasonable, he is quite safe; if he chooses to build without consent, he does it at his peril. It is far more convenient that the decision should be left to some gentleman professionally conversant with the subject, and who is able to judge better than a jury or a magistrate what degree of regularity is necessary with regard to architectural considerations. It must be remembered that he is not the servant of the district board or the vestry, but of the central authority, the Metropolitan Board of Works. It is not to be presumed that an officer in his position will give arbitrary and unjust decisions any more than a magistrate. Somebody must ultimately decide what is the line, and the decision of the architect will be no more ex post facto than that of any other person placed in a judicial position with reference

(1) 4 C. B. (N.S.) 228.

1871

SIMPSON v. SMITH.

to the matter. If it be correctly contended that he exercises a quasi judicial function in this respect, probably he would be bound to hear the parties; there is no doubt that in practice he would always do so. In *Bauman* v. *Vestry of St. Pancras* (1) the Court of Queen's Bench were clearly of opinion that the final and conclusive decision rested with him.

Field, Q.C., in reply. Where the legislature intended the parties to be heard it has made express provision for the purpose, as, for instance, with respect to the proceeding before the magistrate given by the section itself.

BOVILL, C.J. The question submitted for our opinion appears to be whether the magistrate was right in supposing that the architect's decision was final and conclusive, or whether he was entitled to exercise his own judgment as to the general line of the street. No doubt it is very difficult to arrive at the true construction of this Act with respect to the effect of the architect's certificate or decision. This Court, however, in the case of *St. George, Hanover Square* v. *Sparrow* (2), has pronounced an express decision upon the point which is now before us. That decision, which was arrived at after a very full discussion, and appears to have been carefully considered, was in favour of the view contended for by the present appellant. In the case of *Bauman* v. *Vestry of St. Pancras* (1), by which the magistrate supposed himself concluded, the same point did not really arise. There it appeared that in any point of view the building was beyond the general line of the street. The two points raised were, one as to the form of the summons, and the other whether the certificate of the architect was made in time to give the magistrate jurisdiction. It was assumed on both sides that the certificate was necessary to give jurisdiction, and it is clear that that is so, inasmuch as he is to have power to order the demolition of the building beyond the line fixed by the architect. That being so, the main question was whether that essential condition of jurisdiction was satisfied by a certificate at any time before the hearing. In considering that question no doubt attention was directed to the general scope of the Act; but the precise point that arose in the case of *St. George, Hanover Square* v.

(1) Law Rep. 2 Q. B. 528. (2) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118.

16 Jan 1871

1871

SIMPSON v. SMITH.

Sparrow (1), and that arises here, it was not necessary to decide. There is, therefore, nothing in my view necessarily inconsistent between the decision of this Court and that of the Queen's Bench. The Lord Chief Justice of the Queen's Bench says in giving judgment, "It appears to me that the learned judges in the Court of Common Pleas, in holding that it was competent to the magistrate to fix and determine a general line different from that determined by the architect, overlooked the important fact that it is the line fixed by the architect which gives the magistrate jurisdiction to determine whether or not the erection of the building is an offence, and that the magistrate has no jurisdiction, except with reference to that line." Now, it is clear, upon referring to the report of the case of *St. George, Hanover Square* v. *Sparrow* (1) that that point was not overlooked, inasmuch as Byles, J., refers to it both during the argument for the appellant and that for the respondent. And then there is the further case of *Wandsworth Board of Works* v. *Hall* (2), in the course of which we expressed our adherence to the decision in *St. George, Hanover Square* v. *Sparrow* (1) although it was not necessary to decide the point now under consideration, inasmuch as the building there was beyond the line which was fixed by the magistrate as well as by the architect as being the general line of buildings. Such being the state of the authorities, our attention has been directed to the opinions thrown out by the Queen's Bench in the case of *Bauman* v. *Vestry of St. Pancras* (3), and it has been argued that our former decision was erroneous. Now it must be admitted, as I have said, that the language of the section is extremely obscure, but if it had been intended that the line laid down by the architect should be final and conclusive, one would have expected to find some express provision to that effect. There are many instances in Acts of Parliament where it is provided that things shall be decided in a certain way, and the Acts then proceed to say that such decision shall be final and conclusive. The general frame of this Act appears to exclude this supposition; for if the architect's decision were final, all that would have been necessary, if a building were erected beyond the line fixed on by him, would have been to enable the board to

(1) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118.
(2) Law Rep. 4 C. P. 85.
(3) Law Rep. 2 Q. B. 528, 532.

demolish it straightway; but the decision of a magistrate is interposed. Can it have been intended that he should be a mere ministerial officer, charged only to carry into effect the decision of the architect? He must, it seems to me, have been intended to act judicially and decide the question for himself. There is no provision rendering it necessary for the architect to hear the parties before coming to a decision or controlling him in any way in the exercise of his discretion. It would be very strange if a thing that a man might do at his own home without hearing any reasons should be absolutely conclusive. It is clear there ought to be some appeal, and that appeal the interposition of the magistrate, according to our view, provides. Again, if it were intended to make a person guilty of an offence with reference to a line laid down by the architect, one would say that it must be intended that it should be laid down at some fixed point of time, and should be published in some way in order that the party to be affected should be aware of its existence. If the construction put on this Act had been that the architect must have laid down an absolute line for all buildings before the time when the erection complained of took place, there would be some pretence for saying that the party building beyond that line would necessarily be guilty of an offence. But the courts have laid it down that the certificate may be given at any time before the hearing. It has been so held both in the Queen's Bench and in this court. That being so, it is possible that such certificates may be given by different architects at different times, and may vary from time to time. It would therefore be impossible for the party intending to build to know whether what he proposes to do will be an offence or not. This is an extremely penal enactment, restricting the ordinary legal enjoyment of property, and we ought therefore to put a reasonable construction upon it. Assuming that the certificate may be given at any time, if it is final, we are driven to say that a man is to be deemed guilty of an offence, and his property destroyed, because he has done a thing which, though legal at the time when it was done, by something done subsequently by the architect is converted into an offence. This is contrary to all the principles of justice and sound legislation. It therefore seems to me to follow naturally from the construction placed upon this Act with

1871

SIMPSON v. SMITH.

respect to the time of giving the certificate, that it cannot be conclusively binding upon the magistrate. The first part of the enactment is, "that no building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in the street." Now suppose a person to be about to build, what is to guide him as to the line within which he is to erect his building? If the architect had laid down an absolute general line, and he proceeded to build beyond it, perhaps it might reasonably be held conclusive against him; but where no such line is laid down, how is he to tell whether he is about to contravene the Act or not? Moreover, how is he to know whether it is necessary for him to apply for the consent of the Metropolitan Board of Works? There is nothing to guide him except reference to what is the general line of buildings, in fact. It may well be that after the building has been erected and a question has arisen whether it is within the general line of the street, for the guidance of the board, that question may be referred to the decision of their architect, and such decision may be primâ facie evidence, until controverted. It seems to me that that construction would reasonably satisfy the words of the Act. It is sought to go further, and to say that the simple word of the architect given without hearing any one, in contravention it may be of the actual fact, and even ex post facto, is to be conclusive. Such a construction seems to me one which we ought not to accept unless actually compelled by the words of the Act.

Again, the certificate is to be given by the architect for the time being. That would certainly include the time when the certificate is required, e.g., if there was a prosecution and a certificate were required, it might be given two or three days before the hearing. Now suppose the architect at some other time had given a different certificate. In such a case I am at a loss to understand what is to be done, unless in case of dispute the magistrate is to decide what is the general line. The decision of the architect may be primâ facie evidence, but that is very different from its being conclusive so as to exclude all other evidence. It may be that either view of this case presents difficulties, but if the question be doubtful, I should prefer to abide by the previous express decision of this Court.

1871

SIMPSON v. SMITH.

WILLES, J. I am of the same opinion. The first case in which a question arose similar to the present, was the case of *Tear* v. *Freebody* (1). The word used in the Act on which that decision turned, was the "regular" not "general" line of buildings, and there was no provision for an architect's certificate. It was laid down in that case, and the decision was not afterwards quarrelled with, that "regular" line did not mean absolutely straight line or regular curve, but such line as would preserve a general uniformity of appearance. It was to be a question of substantial regularity, not of mere inches or even, perhaps, feet. By this Act, which introduces the architect's certificate, the language is altered, and the word "general" substituted for "regular." I cannot help thinking that it was not intended to overrule, but rather to adhere to the decision in *Tear* v. *Freebody* (1). It seems to be probable that it was meant that a small departure from geometrical straightness of line should not be subject to a penalty, and that in dealing with a question which was one merely of an eyesore, and not a nuisance, the judge who had to decide should have some latitude in determining whether what had been done was merely a small matter coming within the rule, de minimis non curat lex, or a substantial departure from the intention of the legislature. The case of *St. George, Hanover Square* v. *Sparrow* (2) is an instance of the reasonableness of this construction. The erection there complained of was a small glass conservatory on a balcony, which could have a very trifling effect on the beauty or uniformity of the street, and which a jury certainly under the old law would not have found to be beyond the regular line of the street. The architect who in that case, no doubt, conceived that the strict geometrical line of straightness was to be taken, decided that it was beyond the line. It is obvious that in such a case it is most wholesome that there should be some mode of correcting such a decision according to the dictates of common sense. I do not see, therefore, why the Court should go out of its way in order to hold that "decided" means exclusively and conclusively decided, rather than decided in the first instance subject to correction by some judicial officer by whom the matter of complaint has to be determined. I entirely agree with my Lord that if the general line is to be conclusively decided

(1) 4 C. B. (N.S.) 228. (2) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118.

1871

SIMPSON v. SMITH.

by the certificate, it must mean that such line is to be so decided at the time when the alleged offence is committed. But I adopt the construction that the certificate is to be given pro re natâ; and that being so, it must be subject to judicial revision so far as it affects a person whose servant the architect is not. In the case of *Barraclough* v. *Greenhough* (1) under 20 & 21 Vict. c. 77, s. 64, which provides that on notice to the other side in cases affecting real estate, the probate shall be sufficient evidence of the will, and of its validity and contents, it was held that the probate was not conclusive evidence of the validity. With the utmost respect for the opinion of the Court of Queen's Bench as expressed in the case of *Bauman* v. *Vestry of St. Pancras* (2), I must say that in my opinion the observations made in that case do not seem at all successful in impugning the reasoning of the judges of this Court in the case of *St. George, Hanover Square* v. *Sparrow*. (3)

MONTAGUE SMITH, J. I also think our judgment should be for the appellant. There is no doubt that the meaning of this section is very obscure. If this matter had been res integra, I should have hesitated without further consideration in arriving at this conclusion. I doubt whether the legislature did not intend the opinion of the architect to be decisive on the question of the general line of the street, leaving it only to the magistrate to determine the question whether in fact the building was erected beyond such line without the consent of the Board of Works. But it appears that there is an express decision of this Court in the case of *St. George, Hanover Square* v. *Sparrow* (3) to the contrary. That being so, though I entertain some doubt on the matter, I do not think it would be proper for me to dissent from the opinion held by the rest of the Court.

BRETT, J. I am of the same opinion. The magistrate held that the architect's certificate was conclusive. The assertion that he was right involves this proposition; though there were in fact a general line of the street and the architect's decision with regard to it were wrong, and could be proved to be so; though he were to give it after the erection of the building, and even after the dispute had arisen, and without hearing the parties, it would be conclusive.

(1) Law Rep. 2 Q. B. 612.
(2) Law Rep. 2 Q. B. 528.
(3) 16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118.

I take it that the section could not apply till there was a general line in fact. Unless the certificate be wrong, and can be proved to be so, this argument would be futile and useless. The supposition that that is the case, alone renders the decision of this point necessary. There is nothing to confine the giving of the certificate to any particular point of time, and the Queen's Bench decided that it might be given up to the last moment before hearing. It is clear that it may be given without hearing the parties. The observation of Mr. Field appears unanswerable, that when the legislature intended the parties to be heard as before the magistrate, they have expressly said so, and provided for a summons being issued. There is no such machinery provided in case of the certificate. Such then being the proposition to be contended for, of course if the words of the statute be plain, they must be obeyed; but we ought not, if they be not plain, to accept such a conclusion. It is one in contravention of the rights of property and the ordinary principles of justice. According to it a person after purchasing land at a great price in this metropolis, and after having actually built upon it in the exercise of the ordinary right of property given him by the general law, may be forced to pull down his building and make a most valuable portion of his property a waste, by reason of a certificate which may be wrong in point of fact, and given without hearing the parties, and ex post facto. The question is whether the Act clearly provides this. The prohibitive part of the enactment is contained in the beginning of the section: "No building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings." In order that the building may be constructed beyond the general line, there must first be an actual general line. So in order to consent being given to building beyond the general line, there must first be such a line in fact. The complaint is to be of the erection of such building, and is to be proved to the satisfaction of the magistrate. The question is whether the whole of these enactments are to be controlled by the provision relating to the architect's certificate.

Of course the statute may be so construed, but looking to the considerations of hardship and injustice I have pointed out, the question seems to me to be whether it must be so construed. It

1871

SIMPSON v. SMITH.

does not seem to me that the clause as to the architect's certificate is made any part of the prohibitive enactment. I think that that clause is satisfied by holding that it provides for what shall be good and sufficient evidence for the proof of the general line of the street. The question, as my Brother Willes said, is whether the word "decided" in the statute is to be read as meaning conclusively decided, or only primâ facie. It seems to me not clear that the legislature meant the former, and therefore as such a meaning would be contrary to natural justice, I think we are bound to hold the contrary. I do not feel pressed with the argument that the magistrate is to order the building to be pulled down to the line "so fixed as aforesaid," because it appears to me that only means so fixed subject to the decision of the magistrate. Besides these grounds, derived from the reason of the thing and the words of the Act, this very point has been previously decided by this Court, and that decision has never been overruled.

Judgment for the appellant.

Attorneys for appellant: *Markby & Tarry.*
Attorneys for respondent: *Capron, Dalton, & Hitchins.*

Jan. 17.

BRODRICK AND ANOTHER *v.* SCALÉ.

Bill of Sale—17 & 18 *Vict. c.* 36, *s.* 1—*Affidavit filed on Registration—Description of Occupation of Attesting Witness.*

The attesting witness to an instrument within the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), was clerk to an attorney at the time of its execution, and was described as such in the attestation clause. The affidavit filed with the bill of sale on registration was made by the attesting witness, and after verifying his signature to the bill of sale as attesting witness, described him as a gentleman residing at No. 3, Bramah Road, Brixton, in the county of Surrey:—

Held, that the affidavit was insufficient, inasmuch as it did not, either directly or indirectly, by reference to the bill of sale, contain a description of the occupation of the attesting witness as required by the Bills of Sale Act, s. 1, and that the bill of sale was therefore void as against an execution creditor.

INTERPLEADER issue, in which the plaintiffs claimed to be entitled to certain goods taken in execution under a fi. fa. as against the defendant, the execution creditor.

At the trial, which took place before Bovill, C.J., at the last Surrey Assizes, the facts appeared to be as follows:—The plaintiffs were the trustees of a post-nuptial settlement, dated the 6th of July, 1868, by which the execution debtor had assigned to them (inter alia) the goods in question, upon certain trusts therein mentioned. The execution of it was attested by "Vernon J. Y. Shaw, clerk to Thos. Wm. Flavell, solr. 21, Bedford Row, W.C." The instrument not being made in pursuance of ante-nuptial articles, and being therefore within 17 & 18 Vict. c. 36, was registered under that Act on the 21st of July, 1868, and the affidavit filed therewith was made by "Vernon John Yardley Shaw, of 21, Bedford Row, Holborn, gentleman." It stated that the deponent was present on the 6th day of July, 1868, at the execution of the bill of sale, a copy of which, and of every schedule and attestation thereto was annexed, and after verifying the signature of the maker of it, concluded as follows: "And I further say that the name or signature, 'Vernon J. Y. Shaw,' subscribed to the said indenture and bill of sale, as the attesting witness thereof, is in my handwriting, and that I am a gentleman residing at No. 3, Bramah Road, Brixton, in the county of Surrey." It appeared that the attesting witness was in fact clerk to an attorney at the time of the execution of the bill of sale. It was contended on these facts, on behalf of the defendant, that the affidavit was not in compliance with the statute, inasmuch as it did not give a sufficient description of the occupation of the attesting witness. The learned judge thereupon directed the verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter it for themselves, on the ground that the description in the affidavit was sufficient.

A rule nisi had been accordingly obtained. (1)

(1) By the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), s. 1: "Every bill of sale of personal chattels made after the passing of the Act, ... whereby the grantee or holder shall have power either with or without notice, and either immediately after the making of such bill of sale, or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale and every schedule, &c., or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of

1871

BRODRICK v. SCALÉ.

Jan. 11. *Day* shewed cause. The Bills of Sale Act, 1854, requires that the affidavit filed with the bill of sale on registration should contain a description of the residence and occupation of the maker, and of every attesting witness to the bill of sale. In *Allen* v. *Thompson* (1) it was held not to be a sufficient description of the occupation of the assignor, who was a clerk in a government office, to term him simply a "gentleman." So also in *Tuton* v. *Sanoner* (2), it was held that the residence and occupation of the attesting witness, as well as of the assignor, must be described in the affidavit, and that an attorney or attorney's clerk was not duly described merely by the term "gentleman," without mention of his profession. [He also cited *Foulger* v. *Taylor* (3), and *Pickard* v. *Bretz* (4).]

Jan. 17. *Ribton* and *Bromby* supported the rule. Assuming the words "and of every attesting witness" refer to all cases, and not only cases where the bill of sale is given under process, and that the Act therefore requires a description of the attesting witness, as well as a description of the residence and occupation of the maker of the bill of sale, it is contended that both in the language of the Act and the reason of the thing there is a distinction between the two cases. The same strictness and accuracy is not required with respect to the one as to the other. The case of *Allen* v. *Thompson* (1) refers to the maker of the bill of sale, and is therefore not in point. The same distinction applies to the case of *Pickard* v. *Bretz*. (4) It is submitted that it is sufficient if the true description of the attesting witness can be gathered from the bill of sale and affidavit taken together. In the case of *Tuton* v. *Sanoner* (2) there was no correct description either in the bill of sale or the affidavit. Here it sufficiently appears from a comparison of the two documents that the person making the affidavit is identical with the attesting witness to the bill of sale, and in the bill of sale the correct description is given. In the case of *Banbury* v. *White* (5)

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the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docquets, and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale," &c. &c.

(1) 1 H. & N. 15; 25 L. J. (Ex.) 249.

(2) 3 H. & N. 280; 27 L. J. (Ex.) 293. 4 Jur. N. S. 365.

(3) 5 H. & N. 202; 29 L. J. (Ex.) 154.

(4) 5 H. & N. 9; 29 L. J. (Ex.) 18.

(5) 2 H. & C. 300; 32 L. J. (Ex.) 258. 9 Jur. N. S. 913.

(11 C. 2 Jur. N. S. 451. (4 C. 5 Jur. N. S. 1134.

Pollock, C.B., says, "My late Brother Watson, who was a remarkably accurate judge, expressly said that, provided the affidavit shewed the occupation by reference to the bill of sale, that would be sufficient."

[WILLES, J. The affidavit in the present case does not come up to that in *Banbury* v. *White*. (1) Here the deponent swears no doubt that he is the same person who attested the bill of sale, but he does not swear that the description given of him there is true.

BOVILL, C.J. You cannot take the bill of sale and the affidavit together for this purpose unless there is such a reference by the latter to the former as to verify the description contained in it.]

The affidavit may be fairly construed as incorporating the description.

[They also cited *Routh* v. *Roublot* (2) and *London and Westminster Loan and Discount Company* v. *Chace*. (3)]

BOVILL, C.J. I should have been very well pleased if it had been possible to support this bill of sale, because it does not appear to me that there was any intention to deceive or mislead by giving an insufficient description. The Act, however, in my opinion, distinctly requires the oath of the person making the affidavit as to the description of the residence and occupation of every attesting witness. With this provision we have no power to dispense. It has been established by the decision in *London and Westminster Loan and Discount Company* v. *Chace* (3) that the description must be that which fits the party at the time of the execution of the bill of sale and not of filing it, and that though the affidavit may state that the party "is" of such an occupation that may fairly be taken to refer to the time of execution. That being so, the question here is whether there is a sufficient description of the occupation of the attesting witness verified on oath. The description given is "gentleman." In point of fact, the attesting witness was an attorney's clerk when he attested the bill of sale. The description is not correct. The term "gentleman" has been held not to be a sufficient description of the occupation of

(1) 2 H. & C. 300; 32 L. J. (Ex.) 258. (2) 1 E. & E. 850; 28 L. J. (Q.B.) 240.
(3) 12 C. B. (N.S.) 730; 31 L. J. (C.P.) 314.

1871

BRODRICK v. SCALÉ.

the assignor if he have one. It is true that in certain cases the affidavit has been held sufficient where there was a clear reference in it not only to the bill of sale but to the description contained therein as in *Banbury* v. *White*. (1) But it is impossible by any straining of the language of this affidavit to construe it as pledging the oath of the maker of it to the truth of the description in the bill of sale. It would be impossible to assign perjury upon it with reference to this matter. For these reasons I think the rule must be discharged.

WILLES, J. I am of the same opinion. The present is one of those cases in which a person having a security upon the goods of another chooses to allow those goods to remain in the other's possession, and keeps back his security until some other creditor comes forward with an execution. With reference to cases where by the terms of the bill of sale the grantor is intended to remain in possession of the property comprised therein, the legislature looking to the numerous frauds carried on by means of such instruments, have imposed upon them certain restrictions and conditions, and provided that if these be not complied with the bill of sale shall be void. In dealing with these cases we are bound to give the language of the Act its ordinary natural meaning, neither enlarging nor presuming to restrict the effect of its provisions. I entirely agree in this respect with what was said by Williams, J., in the case of *London and Westminster Loan and Discount Company* v. *Chace* (2). Looking, therefore, at the statute in that spirit, what does it enact? [His Lordship here read the 1st section]. The first question that arose on that enactment was whether the description of the residence and occupation was sufficiently given by the bill of sale itself. With respect to the grantor, it had been insisted that by the words of the statute it was clear that the description was meant to be separate from the affidavit of the time of giving the bill of sale, and so the Act was satisfied by the description contained in the bill of sale. It was, however, decided very early by the case of *Hatton* v. *English* (3),

(1) 2 H. & C. 300; 32 L. J. (Ex.) 258.

(2) 12 C. B. (N.S.) 730; 31 L. J. (C.P.) 314.

(3) 7 E. & B. 94; 26 L. J. (Q.B.) 161.

that it was not sufficient that the bill of sale should contain the description. Crompton, J., there says, "I entertain no doubt that the intention of the legislature was that the affidavit should contain the descriptions required." The next point that arises is whether a similar description is required in respect of the attesting witness, for, if so, the same construction must be applicable to it. It has been questioned whether the description of the attesting witness is required in cases only where the bill of sale is given under execution of process or in every case. That depends on whether the words commencing "or in case," and ending with "have issued," are to be read as parenthetical or not. That question must be answered by reference to the sense and substance of them. In the case to which they refer the grantor of the bill of sale would not be the person to whom the goods belonged, but the sheriff; so it would have been idle to direct that the description of the grantor should be given in such a case; in that particular case, therefore, the description of the person against whom process issued is to be given. It is quite plain that these words exhaust themselves with reference to that particular case, and are merely parenthetical. What succeeds is therefore applicable to every bill of sale, and leaving out the parenthesis the section will read, "And a description of the residence and occupation of the maker and of every attesting witness to the bill." It was suggested by the counsel, who argued in support of the rule, that a distinction was to be drawn between the description required by the Act in the case of the attesting witness, and that required in the case of the maker of the bill of sale. I am clearly of opinion that the true construction of the words is, that the statute meant to require a similar description with respect to the attesting witness to that required with respect to the maker. The question therefore arises whether there is such a description in this affidavit. It has been established in so many cases, that the description required by the Act is a "true" description, that it would be waste of time to refer to any authority for that proposition; it is also established that that description must be that which was applicable at the time of the giving of the bill of sale. Now this affidavit describes the attesting witness as a "gentleman." Giving this term its extreme limits, viz., as meaning a person with no

1871

BRODRICK v. SCALÉ.

particular occupation, who chooses to call himself such, it is an incorrect description here, inasmuch as the attesting witness followed the occupation of an attorney's clerk. So far, therefore, the affidavit does not comply with the statute. With respect to the case of *Banbury* v. *White* (1), in which Pollock, C.B., suggested that it would be sufficient if the affidavit referred to the description of the residence and occupation of the attesting witness mentioned in the bill of sale, it must be observed that it is against the plaintiff's contention, in so far as it shews that in the opinion of the Chief Baron there must be the same description in the case of the attesting witness as in that of the maker, and with respect to the point for which it was cited it is really inapplicable. The Chief Baron based his observations on the fact that the affidavit there stated "my residence and occupation hereinbefore set forth is the true description of my residence and occupation." That affidavit, therefore, contained the element on the absence of which the whole question here arises, viz., a description by reference of the occupation of the attesting witness, and a statement of the truth of such description. For these reasons I am of opinion that the provisions of the statute have not been complied with, and the bill of sale is therefore void as against the defendant.

MONTAGUE SMITH and BRETT, JJ., concurred.

Rule discharged.

Attorney for plaintiff: *Parke.*
Attorneys for defendant: *Dubois & Griffiths.*

(1) 2 H. & C. 300; 32 L. J. (Ex.) 258.

HAYNE *v.* PRATT.

1871
Jan. 31.

Practice—Attachment—Contempt in not answering Interrogatories—Waiver of Right to have answered.

Interrogatories having been delivered to the defendant, in an action of detinue, and still remaining unanswered, a judge's order was made by consent, whereby the plaintiff was to be at liberty to sign final judgment for 1000*l.* damages and costs, on the terms that execution was not to issue if the goods detained were delivered up within a certain time. The plaintiff signed final judgment, and the goods not being delivered up, obtained an order for the issue of execution for return of the chattels detained. An application under these circumstances having been made for an attachment against the defendant for not answering the interrogatories:—

Held, that the consent to the final judgment was an abandonment by the plaintiff of his right to have the interrogatories answered, and that the application must therefore be refused.

THIS was an action of detinue, in which the plaintiff sought to recover from the defendant certain pieces of ancient armour which had been entrusted to him for the purpose of being cleaned.

On the 18th of November, 1870, an order was obtained by the plaintiff for the delivery of interrogatories to the defendant, asking, among other things, for information as to what had become of the articles detained. On the 3rd of December interlocutory judgment was signed in the action for want of a plea. On the 31st of December a judge's order was made by consent, whereby the plaintiff was to be at liberty to sign final judgment for 1000*l.* damages, with costs to be taxed, but execution was to be stayed till the 12th of January, 1871, and on the defendant in the mean time delivering up the whole of the armour properly cleaned, he was to be allowed 30*l.* in account for cleaning the same, and no further proceedings were to be taken. In pursuance of the order final judgment was signed on the 3rd of January, 1871. The interrogatories were never answered. The defendant never delivered up the armour, and on the 14th of January an order was obtained at chambers, under the 78th section of the Common Law Procedure Act, 1854, that execution should issue for the return of the articles detained. A writ of execution accordingly was issued, which, however, the sheriff was unable to execute, because he could not discover where

1871

HAYNE v. PRATT.

the articles were. The order for the interrogatories having been made a rule of Court,

Jan. 21. *R. Gadsden* moved for a rule nisi for an attachment against the defendant for contempt in not answering the interrogatories.

[KEATING, J. The object of the motion is to assist the sheriff to execute the writ.

BRETT, J. Can you take advantage of a power given by the statute with a view to obtaining a verdict for the purpose of getting execution?]

A contempt has been committed before the judgment by not answering. The defendant ought not to be allowed to take advantage of his having wrongfully refused to answer the interrogatories when he should have done so, to escape from doing so altogether. As a general rule, when the action is for damages, the purpose of interrogatories is answered when judgment is signed, but the case of detinue is peculiar.

[MONTAGUE SMITH, J. Can you enforce the order under circumstances in which you could not procure a fresh order? The contempt was complete at the time when the consent to the judge's order for judgment was given. Has not the plaintiff by such consent waived his right to have the interrogatories answered?]

A private person cannot waive a contempt of Court.

[KEATING, J. It could not surely be contended that an attachment ought to be issued, if it had been an express term of the arrangement that the interrogatories need not be answered.]

Cur. adv. vult.

Jan. 31. The judgment of the Court (Keating, Montague Smith, and Brett, JJ.) was delivered by

MONTAGUE SMITH, J. In this case an application was made for an attachment against the defendant for not answering certain interrogatories. It appeared that on the 31st of December, 1870, a judge's order was made by consent, under which the plaintiff was to be at liberty to sign final judgment for 1000*l.* damages, and costs, subject to certain terms agreed on between the parties, and that, in pursuance of that order judgment was signed and the costs

taxed. Mr. Gadsden, when he moved for the attachment, very properly admitted that the sole object of the plaintiff was to obtain such information as would enable him to get execution. But we are of opinion that the consent to take final judgment was a virtual abandonment by the plaintiff of his right to have the interrogatories answered, and that we cannot now allow the process of the Court to be used for any such purpose.

1871

HAYNE v. PRATT.

Rule refused.

Attorneys for plaintiff: *Du Pasquier, Tremlett, & Eardley Holt.*

LOMAX *v.* BUXTON.

Feb. 7.

*Bankruptcy, Act of—Assignment of all Debtor's Property—Fresh Advance—Power to seize after-acquired Property—Liquidation by Arrangement—*32 & 33 *Vict. c.* 71, *s.* 125.

A bill of sale including all the existing property of a trader and containing a power to seize all after-acquired property with a certain exception, was made by him in favour of a creditor, in consideration partly of an existing debt and partly of a sum advanced by such creditor. This advance consisted of a sum paid to another creditor in satisfaction of a debt secured by a previous bill of sale over the same property, for the purpose of redeeming the property which he had already seized under such bill. More than twelve months after the date of the previous bill of sale proceedings were taken for a liquidation of the debtor's affairs by arrangement, under the 125th section of the Bankruptcy Act, 1869, and a trustee was appointed :—

Held, that the later bill of sale was not an act of bankruptcy.

Quære, whether there is any relation back to an act of bankruptcy in cases of liquidation by arrangement.

Graham v. *Chapman* (12 C. B. 85 ; 21 L. J. (C.P.) 173), commented upon.

DECLARATION by the plaintiff as trustee of the property and effects of William Mitchell Bentley (by whom a petition for liquidation by arrangement had been duly presented according to the laws in force concerning bankrupts), the first count of which was for conversion of the goods of the plaintiff as such trustee, and the second count for money received for plaintiff's use as such trustee.

Pleas 1 and 2, to the first count, not guilty, and not possessed ; 3, to the residue of the declaration, never indebted. Issue.

The case was tried before Brett, J., at the Liverpool Winter

1871

LOMAX v. BUXTON.

Assizes, when the facts appeared to be as follows:—The plaintiff was the trustee of the goods and effects of one William Mitchell Bentley, appointed under proceedings for liquidation by arrangement under the 125th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71.) The defendant was the assignee of the property alleged to have been converted under a bill of sale. Bentley carried on the businesses of a farmer and brickmaker on land at Edgeworth, in the county of Lancaster, and likewise kept a grocer's shop at the same place. In July, 1869, being indebted to one Harwood in a sum of 750*l.*, he gave him a bill of sale including all his property to secure that amount. On the 17th of December, 1869, default having been made by Bentley in payment according to the terms of the bill of sale, Harwood took possession under it of the property therein comprised. The defendant was at that time a creditor of Bentley for a sum of 161*l.* It was arranged that the defendant should advance a sum of 250*l.* to pay off Harwood, who agreed to accept this sum in satisfaction of his debt, and that this advance and the previous debt of 161*l.* due to the defendant, and the expenses of carrying the arrangement into effect, should be secured by a bill of sale of Bentley's property for 450*l.* Accordingly the 250*l.* was advanced by the defendant and paid to Harwood, who thereupon executed a re-assignment of the property to Bentley. On the 19th of January, 1870, Bentley executed a bill of sale, by which he assigned to the defendant all the property of which he was then possessed to secure the sum of 450*l.* This assignment also included all plant, stock-in-trade, or other property which might thereafter be upon the premises in which the business of brickmaking was carried on, or in the shop and dwelling-house of Bentley; but did not include farming stock which he might acquire after the date of the deed. There were the usual provisions for re-assignment by the defendant of the property to Bentley in case the sum secured should be repaid to the defendant on demand, and entitling the defendant to enter upon the premises and to seize and sell the property if default should be made in payment. The deed was duly registered under the Bills of Sale Act, 1854. On the 26th of October, 1870, default having been made in payment of the sum secured by the bill of sale, the defendant caused the goods comprised in it to be seized and they were afterwards sold. On

the 28th of October Bentley presented a petition to the County Court of Bolton, for an arrangement of his affairs by liquidation under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 125), and on the 14th of November a meeting of creditors was held, by which the plaintiff was appointed trustee.

It was contended by the plaintiff's counsel that the bill of sale was an act of bankruptcy, and that the plaintiff was entitled as trustee, under the bankrupt laws, to treat it as such, and therefore void. The learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter it for himself on the above grounds, for an amount to be afterwards ascertained by arbitration.

A rule nisi had been obtained accordingly. (1)

Quain, Q.C., and *Edwards*, shewed cause. Two questions arise with respect to the bill of sale. First, whether it was an act of bankruptcy; and, secondly, whether, if so, the trustee under a liquidation by arrangement can avail himself of it. No actual fraud having been shewn, the only question is, whether the deed is per se a fraud in law, as being substantially a conveyance of all the debtor's property without an equivalent, and so necessarily calculated to defeat and delay creditors. If there is a substantial exception out of the property or an equivalent, the deed cannot necessarily be an act of bankruptcy: *Pennell* v. *Reynolds*. (2) Here there was an equivalent, inasmuch as 250*l.* was advanced.

[WILLES, J., referred to *Graham* v. *Chapman*. (3)]

The ground of that decision was, that the debtor there never

(1) It appeared at the trial, that the defendant had seized and sold farming stock acquired by Bentley after the date of the bill of sale; and the rule obtained, besides seeking to enter a verdict on the grounds above-mentioned, also, sought to enter it for the value of such farming stock, on the ground that it was not included in the bill of sale. The Court were clearly of opinion, and, indeed, it ultimately was hardly disputed in argument, that the bill of sale did not cover this property, and the rule was accordingly made absolute in relation thereto, though, as will be seen, discharged with reference to the property comprised in the bill of sale. This part of the case turning wholly on the terms of the bill of sale does not call for a report, and therefore the facts and arguments relating to it are not set out, and it is only mentioned for the purpose of explaining why the rule was made absolute, the Court being against the plaintiff on the main question.

(2) 11 C. B. (N.S.) 709.

(3) 12 C. B. 85; 21 L. J. (C.P.) 173.

1871

LOMAX v. BUXTON.

really got any advance at all, for, there being a power in the deed to seize after-acquired property, the assignee might have seized the advance itself. See per Erle, C.J., in *Pennell* v. *Reynolds.* (1) Here the debtor had the benefit of the advance by its being applied to satisfy the debt of Harwood, who had a bill of sale over the very property assigned, and had already seized under it. This enabled Bentley to keep the business going for the benefit of himself and his creditors. The case is clearly within the decision in *Hutton* v. *Cruttwell.* (2)

[WILLES, J. The decision in *Graham* v. *Chapman* (3) occasioned some surprise in the profession. Taking the judgment literally, it seems to be based on the assumption that the deed passed the advance itself, but it looks very much as if the Court took a different view of the transaction from the jury, and thought there never was any bonâ fide intention that the 200*l.* should pass.]

Mercer v. *Peterson* (4) is likewise an authority for the defendant.

Then, secondly, there can be no relation back under a liquidation by arrangement. There is no petitioning creditor, and no act of bankruptcy necessary. By the 252nd rule of Procedure in Bankruptcy, proceedings under sections 125 and 126 for liquidation by arrangement or composition, shall be instituted by the debtor by petition and affidavit thereto annexed, according to the forms given in the schedule.

[WILLES, J. Relation back in bankruptcy is to the earliest act of bankruptcy which took place whilst the petitioning creditor's debt was in existence.]

Pope, Q.C., and *Leresche,* supported the rule. It is contended that this case is governed by the decision in *Graham* v. *Chapman* (3), and not by *Hutton* v. *Cruttwell.* (2) In the latter case the deed was made wholly in consideration of a further advance, which was applied to the payment of an importunate creditor, whereas here, as in *Graham* v. *Chapman* (3), the consideration was not only the further advance, but an old unsecured debt. Lord Campbell, C.J., in delivering judgment in *Hutton* v. *Cruttwell* (2),

(1) 11 C. B. (N.S.) 712.
(2) 1 E. & B. 15; 22 L. J. (Q.B.) 78.
(3) 12 C. B. 85; 21 L. J. (C.P.) 173.
(4) Law Rep. 2 Ex. 304; 3 Ex. 104.

17 Jun 392.

expressly points out that that was the chief ground of the decision in *Graham* v. *Chapman* (1), and this leads to the conclusion that the Court of Queen's Bench would have felt bound by the former decision if that circumstance had existed in the case before them. It is contended that where there is an assignment of the whole of the debtor's property there must be some equivalent, applicable to the continuance of his trade, or otherwise to the benefit of the general body of his creditors, if he think fit so to apply it. How could the advance here made constitute such an equivalent? It is said that it was applied to paying out Harwood, who had a bill of sale over the property in question. How did that benefit the other creditors, seeing that the property so freed from Harwood's debt was immediately all transferred to the defendant, and there was a power to seize any property that might be afterwards acquired? The result is to strip the debtor of all his property for the purpose, in substance, of paying off existing debts without leaving the other creditors any real equivalent.

[WILLES, J. The deed does not give power to seize after-acquired farming stock, and this constitutes a distinction between the present case and *Graham* v. *Chapman*. (1)]

WILLES, J. I am of opinion that this rule should be discharged so far as regards the damages claimed for the conversion of the property included in the bill of sale. It is contended that the bill of sale was an act of bankruptcy, and that the plaintiff, as trustee under the liquidation, was entitled to avail himself of it as such. Now it was said that it was an act of bankruptcy on the ground that it was in substance a conveyance of all the bankrupt's property without any substantial exception or equivalent. No extrinsic circumstances were proved at the trial tending to shew actual fraud in the making of the deed; as, for instance, that the advance was only colourable, and it was a sham deed altogether, intended merely to stave off creditors, or that a very much larger amount of property was included in it than would suffice to cover the advance, in order that it might be made use of as a screen to protect the property from other creditors, in either of which cases it might have been void under the Statute of Elizabeth. The only

(1) 12 C. B. 85; 21 L. J. (C.P.) 173.

1871

LOMAX v. BUXTON.

mode of attacking it, therefore, which is open to the plaintiff is on the ground that it is a conveyance of substantially all the debtor's property, and so an act of bankruptcy within the principle laid down by Lord Mansfield in the case of *Worseley* v. *De Mattos* (1), as being necessarily, though made without fraudulent intention, a fraud under the law of bankruptcy, inasmuch as it must either be concealed from the other creditors, who are thereby led to go on dealing with the debtor as if a substantial person, while the whole property is in reality mortgaged to another, who can step in and put a stop to the business, and sweep off the whole of the assets at any moment, or if it be disclosed, the business must be immediately broken up from the destruction of the debtor's credit. The reasons upon which this doctrine of law rests must be looked at in dealing with the question whether any transaction of this kind is an act of bankruptcy. It is obvious, looking to such reasons, that when there is a substantial exception out of the debtor's property, such an exception as might possibly enable him to carry on his trade with advantage, a conveyance cannot come within the rule of law above referred to, as being, necessarily and by force of law, without reference to extrinsic circumstances shewing fraud, an act of bankruptcy. In such a case it would be necessary to prove to the jury some other circumstances besides the mere execution of the deed to satisfy them that it was intended to be a fraud on creditors. So where the conveyance is of the whole property, not merely for an antecedent debt, but also for a present advance of which the debtor really has the advantage, and which he can apply to the purchase of stock, or otherwise for his use, the transaction is considered on the same footing as if there were a substantial exception out of the debtor's property, and therefore not necessarily and per se an act of bankruptcy. So the law stood till the case of *Graham* v. *Chapman* (2) was decided. In that case there was a conveyance of the whole of a trader's property in consideration partly of a bygone debt, and partly of the advance of a substantial sum by the creditor at the time. It must be taken that it was such a sum as would represent the value of goods which if excepted out of the conveyance would, but for the provision that followed, have prevented its being per se an act of bankruptcy within the

(1) 1 Burr. 467. (2) 12 C. B. 85; 21 L. J. (C.P.) 173.

rule of law first laid down in *Worseley* v. *De Mattos*. (1) But then there was a clause enabling the creditor to seize after-acquired property; and on the construction of that clause it was decided that the present advance ought to have no effect on the consideration of the question. I could not help thinking at the time, though perhaps I may have been naturally over-sanguine as one of the counsel engaged in the case, that the verdict of the jury, who found that the deed was executed bonâ fide, and that the advance was real, ought to exclude the consideration upon which the judgment turned. The Court did not, however, take that view, and it will be found, on referring to the last sentence of the judgment, that it lays it down in terms that the deed authorized the assignee to seize not only the goods assigned, but the actual advance made at the time, or any goods purchased therewith. It seems to assume that the creditor might have laid hold of the debtor while leaving the room, and compelled him to hand over the very advance that had just been made. It seems to me, I confess, difficult to see how that could be laid down as a matter of law. Be that as it may, I think that in dealing with the case of *Graham* v. *Chapman* (2) we must take it to have turned on the particular terms of the deed, and the mode in which the advance was there made, and that though there was an advance in point of form, it came into the hands of the debtor under such circumstances that he did not get the real enjoyment of the money so advanced, and that on these grounds it was put out of consideration. Wherever the same special reasons apply, no doubt the Court must act on that decision, until it shall be reconsidered by some higher tribunal, but we ought not to extend the effect of it beyond what was precisely decided; the more so, because in the case of *Hutton* v. *Cruttwell* (3), where the advance was one of which the debtor really had the advantage, the Court of Queen's

(1) 1 Burr. 467. [His Lordship drew attention to a misapprehension in the note to the case of *Graham* v. *Chapman* (12 C. B. at p. 94), where it is stated that the doctrine of law that a conveyance of all a trader's effects is an act of bankruptcy was first laid down in *Law* v. *Skinner* (2 Wm. Bl. 996), such misapprehension appearing to have arisen from the reporter's mistaking 15 Geo. 3, in which year the case of *Law* v. *Skinner* was decided, for 15 Geo. 2, and so supposing that case to have preceded *Worseley* v. *De Mattos*, which was decided in 31 Geo. 2.]

(2) 12 C. B. 85; 21 L. J. (C.P.) 173.

(3) 1 E. & B. 15; 22 L. J. (Q.B.) 78.

1871

LOMAX v. BUXTON.

Bench held the conveyance no act of bankruptcy, though it contained a power to seize after-acquired property. I am of opinion that this deed falls within the principle of the decision in *Hutton* v. *Cruttwell.* (1) The bill of sale was given partly in consideration of an existing debt, and partly of an advance of 250*l.*, to be applied, no doubt, in satisfaction of an existing debt, but a debt that was secured by a bill of sale which covered the whole of the property, and which could not be impeached, being more than twelve months before the proceedings in bankruptcy. Under this bill of sale a seizure had been made, and the creditor had power to sell the property for the purpose of paying himself. It would be an abuse of language to call this a conveyance in consideration merely of existing debts. Then, again, this deed is unlike that in *Graham* v. *Chapman* (2), inasmuch as it does not contain a power to seize all after-acquired property. No power is given to seize after-acquired farming stock, which it would appear was a by no means unimportant exception. Thus there was a substantial exception, and an advance of which the debtor really had the benefit, and which the creditor had no power of getting back, as in *Graham* v. *Chapman.* (2) I am not satisfied that that decision was not really arrived at by reason of the Court's considering that the jury had come to a wrong conclusion in finding that the transaction was bonâ fide, and that a real advance was contemplated, of which the assignor was to have the advantage. However that may be, I do not think, under the circumstances of the present case, it is possible for us to say that this assignment falls within the principle laid down in *Worseley* v. *De Mattos* (3), and is consequently per se an act of bankruptcy. With reference to the after-acquired farming-stock, as that is clearly not covered by the deed, the rule must be absolute.

MONTAGUE SMITH, J. I am of the same opinion. I think that this bill of sale was not an act of bankruptcy. The doctrine that a deed which conveys the whole, or substantially the whole, of a bankrupt's property, in consideration of a bygone debt, is an

(1) 1 E. & B. 15; 22 L. J. (Q.B.) 78. (2) 12 C. B. 85; 21 L. J. (C.P.) 173.
(3) 1 Burr. 467.

act of bankruptcy without fraud in fact, is the creation of judicial decision. Consequently we must look to the decisions to see the extent and the limitations of the doctrine. It has been held that where part of the consideration only is a past debt, this alone will not make the conveyance an act of bankruptcy if there is also a new substantial advance which the debtor may use to relieve himself of pressing liabilities. In the present case the deed includes, substantially, the whole of the debtor's property. And the consideration was a debt due to the creditor of 161*l.*, and an advance of 250*l.*, which was to be applied to the payment of an importunate creditor who had a security on the very property included in the bill of sale, which he was entitled to realise at any moment. It seems to me that, under these circumstances, the case falls within the decision in *Hutton* v. *Cruttwell* (1), and is even a stronger case. The case of *Mercer* v. *Peterson* (2) in the Exchequer Chamber, is also an authority in favour of the defendant. With respect to the case of *Graham* v. *Chapman* (3) I will add nothing to what has been said by my Brother Willes, who is perfectly familiar with the case, having been himself engaged as counsel in it.

BRETT, J. I also agree that with respect to all but the property that was not covered by the bill of sale, this rule must be discharged. Two points were raised for the plaintiff. First, it was said that the bill of sale was an act of bankruptcy; and, secondly, that the plaintiff as trustee under a liquidation by arrangement was entitled to avail himself of it as such. Now it is obvious that the second point need not be decided, if we are against the plaintiff on the first. It is said that this deed was necessarily an act of bankruptcy, without evidence of actual fraud, on the authority of *Graham* v. *Chapman* (3). It appears to me, that that decision, which is possibly destined to be some day overruled, is one that we ought not to extend any further than we are obliged. For the reasons that have been already pointed out, I do not think the present case comes within the authority of *Graham*

(1) 1 E. & B. 15; 22 L. J. (Q.B.) 78. 17 Jur 392.

(2) Law Rep. 2 Ex. 304; Law Rep. 3 Ex. 104.

(3) 12 C. B. 85; 21 L. J. (C.P.) 173.

1871

LOMAX v. BUXTON.

v. *Chapman* (1), but rather within that of *Hutton* v. *Cruttwell* (2) and *Mercer* v. *Peterson* (3).

Rule absolute accordingly.

Attorneys for plaintiff: *Chester & Urquhart, for Hall & Rutter.*
Attorneys for defendant: *Goldring, for Ramwell & Pennington.*

Jan. 13.

CHURCH *v.* BARNETT AND ANOTHER.

Practice—Changing the Venue.

The venue will not be changed from the place where the plaintiff has laid it unless it be shewn that there will be a manifest preponderance of convenience in trying the cause elsewhere; and, where a judge at chambers has refused to change it, a strong case will be required to induce the Court to interfere.

A cause of action arose in London. The venue was laid in Middlesex. The Court refused to change it to London, upon an affidavit that the plaintiff and the defendants and their witnesses (to prove a custom of trade) all had their places of business within a few minutes' walk from Guildhall, and that there would be great difficulty in procuring their attendance at Westminster,—the master and a judge at chambers having already exercised their discretion and refused an order.

Per Willes, J. The supposed resolution as to the change of venue referred to in *De Rothschild* v. *Shilston* (8 Ex. 503; 22 L. J. (Ex.) 279) has not received the sanction of the judges.

ACTION upon a contract for the sale by the defendants to the plaintiff of 20,000 stand of Enfield rifles with bayonets complete. The contract was alleged to have been entered into in the city of London, through the medium of certain commission-agents there. The alleged breach was the defendants' refusal to allow the rifles to be inspected. The damages claimed were 20,000*l.* The venue was laid in Middlesex. Before plea, but after time to plead obtained, the defendants took out a summons to change the venue to London, upon an affidavit that the question of fact to be tried would depend upon the authority of the agents to make the alleged contract, and the usage as to payment of a deposit on such contracts; that the plaintiff and the defendants respectively carried on business in the city of London, where the contract (if any) was made; that the defendants and their witnesses were

(1) 12 C. B. 85; 21 L. J. (C.P.) 173.
(2) 1 E. & B. 15; 22 L. J. (Q.B.) 78.
(3) Law Rep. 2 Ex. 304; Law Rep. 3 Ex. 104.

17 Jur. 392.

engaged in extensive business in the city, and the inconvenience of attending the trial of the cause, if it took place at Westminster instead of in London, would be very great, the respective places of business of the plaintiff and defendants and of their witnesses respectively being within a few minutes' walk of Guildhall; and that, in the judgment and belief of the deponent (one of the defendants), it was very important that the cause should be tried by a special jury of merchants familiar with the course of business in the city of London. The summons was heard before a master, and dismissed; and an appeal to a judge was unsuccessful.

Sir G. Honyman, Q.C., moved for a rule to the like effect. The affidavit, unanswered, discloses a sufficient preponderance of convenience in a trial in London to bring the case within that of *Smith* v. *O'Brien* (1) and the resolution of the judges referred to in *De Rothschild* v. *Shilston* (2), which is that "the defendant may, if he pleases, rely only on the fact that the cause of action arose in the county to which he seeks to have the venue changed, which ground shall be deemed sufficient, unless the plaintiff shews that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why the venue should not be changed."

[WILLES, J. I undertake to say that that has never received the sanction of the judges, and has not been acted upon. It was a mere suggestion. It does not correctly represent the practice.]

The difficulty of getting mercantile men to come from the city to Westminster to give evidence as to customs of trade, is well known to all who are engaged in mercantile cases; whereas, no material inconvenience can arise if the trial takes place at Guildhall, in the immediate vicinity of their places of business.

BOVILL, C.J. The rule is that the venue shall not be changed from the place where the plaintiff has thought fit to lay it, without the special order of a judge: and that order is to be made only where there is a manifest preponderance of convenience in trying

(1) 26 L. J. (Ex.) 30. (2) 8 Ex. 503; 22 L. J. (Ex.) 279.

1871

CHURCH v. BARNETT.

the cause in the place to which the defendant seeks to remove the venue. In *Durie* v. *Hopwood* (1), Erle, C.J., says: "We are always most anxious that causes shall, if possible, be tried where the matter in contest arose." And Willes, J., refers to *Helliwell* v. *Hobson* (2) as an authority to shew that the Court will not deprive the plaintiff of the right to lay his venue where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue. No doubt it is matter of great convenience to merchants in the city of London that causes should be tried at Guildhall: and it is unnecessary to say what my opinion would have been if this had come before me as an original application for leave to change the venue. The matter has been before a master at chambers, and he has exercised his discretion upon the facts brought to his notice. There was an appeal from his decision to my Brother Martin, and he confirmed what the master had done. The defendants, who now come to appeal against these two decisions, should have made out a conclusive case of preponderance of convenience in favour of their view. The affidavit is most loose. It contains a mere statement by one of the defendants, not that he is so advised, but that in his judgment it will be more convenient to have the cause tried at Guildhall. It is not at all satisfactory to my mind, especially coming as it does by way of appeal. If the venue had originally been laid in the country, I should have thought there was a preponderance of convenience in trying the cause in London. But, as between a trial at Westminster and a trial at Guildhall, there can be no such preponderance. The special juries at both places consist pretty much of the same class; almost as many merchants are summoned to try causes at Westminster as in London: and, as to the witnesses, the difference is simply that of going from their residences to Westminster instead of to Guildhall. Coming as this does by way of appeal, I am not satisfied that the master and the learned judge have exercised a wrong discretion.

WILLES, J. I am of the same opinion. With respect to the supposed resolution of the judges in *De Rothschild* v. *Shilston* (3),

(1) 7 C. B. (N.S.) at p. 837. (2) 3 C. B. (N.S.) 761.
(3) 8 Ex. 503; 22 L. J. (Ex.) 279.

I repeat that it is not correctly represented, inasmuch as it suggests that it is sufficient for the defendant to rely on the fact that the cause of action arose in the county to which he seeks to have the venue changed, unless the plaintiff shews that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why it should not be changed. That is not so. If it were so, the attempts would have succeeded which were made in numbers soon after that supposed rule was published, upon the simple affidavit I refer to. That part of the suggestion of the committee was never adopted by the judges. If it had been, a rule of Court would have been made. A plaintiff, therefore, has a right to lay his venue where he thinks proper. If he does so capriciously, a judge will change the venue to the place where the cause of action arose. But, where he has not exercised a capricious choice, the defendant, who seeks to deprive him of an undoubted right, must shew that there will be a practical preponderance of convenience in trying the cause in the place where the cause of action arose. It lies on him to make that out to the satisfaction of the judge. In the present case I cannnot see that there would be a manifest preponderance of convenience in trying this cause at Guildhall rather than in Middlesex. In respect to the place, there is nothing to make it more desirable that the cause should be tried at Guildhall rather than at Westminster. And, as to time, there is a probability of the cause being more speedily tried at Westminster than at Guildhall. Upon the whole, therefore, I think the master and the learned judge did not exercise a wrong discretion in refusing to change the venue, and that there is no reason why we should interfere.

MONTAGUE SMITH, J. I should be sorry if our refusal to grant this rule should be construed into an approval of a cause being tried in Middlesex which ought to be tried in London. But I am disinclined, after the master and the learned judge have both exercised their discretion in the matter, to overrule what they have done, unless we could see clearly that they were wrong. The question is whether there would be so manifest a preponderance of convenience in trying this cause in London that we ought to reverse what they have done. If the matter had come before me

1871

CHURCH v. BARNETT.

in the first instance, this motion probably would not have been necessary.

BRETT, J. I agree with the rest of the Court, and for the same reasons, that there should be no rule.

Rule refused.

Attorneys for defendants: *Thomas & Hollams.*

Jan. 16.

MOESER *v.* WISKER.

Vendor and Purchaser—Contract for the Sale of Land—Unreasonable Conditions.

The plaintiff contracted to purchase of the defendant the lease, &c., of a public-house, by a memorandum in the following form:—"Received of Mr. Moeser the sum of 80*l.*, being the deposit on account of 800*l.*, the purchase-money for the Wheat Sheaf Tavern, the contract for which is now being prepared, to be signed by the vendor and purchaser when completed and ready for signature. B. B. Wisker."

The contract tendered to the plaintiff for signature contained, amongst others, stipulations that the purchaser should pay the expenses of the investigation of the vendor's title, and that, if the purchaser should insist on any objection or requisition as to title which the vendor should be unable or unwilling to remove or comply with, the vendor might annul the sale, and return the deposit, but without any interest or costs of investigating the title; and that if the purchaser should fail to comply with the above conditions his deposit should thereupon be forfeited to the vendor, who should be at liberty to re-sell the property.

The plaintiff refused to sign this contract, on the ground that it contained unreasonable terms, and the defendant re-sold the property:—

Held, that the plaintiff was entitled to recover back his deposit.

ACTION to recover 80*l.* received from the plaintiff by the defendant under the following circumstances:—

The defendant, as mortgagee in possession of a tavern in Hand Court, Holborn, called the Wheat Sheaf, contracted to sell the lease, fixtures, and goodwill thereof to the plaintiff for 800*l.* The parties met at the office of the defendant's attorney on the 23rd of July last, when a deposit of 80*l.* was paid to the defendant, for which he gave a receipt in the following form:—

"Received the 23rd of July, 1870, of Mr. H. Moeser, by payment of Mr. C. Day, the sum of 80*l.*, being the deposit on account of 800*l.*, the purchase-money for the Wheat Sheaf Tavern, Hand Court, the contract for which is now being prepared, to be signed

by the vendor and purchaser when completed and ready for signature." (signed) "B. B. Wisker."

On the 26th of July the plaintiff received notice from the defendant's attorney that the extended contract was ready for signature. This contract was as follows:—

"Memorandum of agreement made, &c., between Neville Browne, of the Wheat Sheaf Tavern, Hand Court, Holborn, of the first part, B. B. Wisker, of &c., of the second part, and H. Moeser, of &c., of the third part: Whereas, the said N. Browne, with the concurrence of the said B. B. Wisker, his mortgagee, on his, B. B. Wisker's, receipt of the balance of the purchase-money as hereinafter mentioned, agrees to sell to Moeser, and Moeser agrees to purchase, at the sum of 800*l.*, the lease and goodwill (with the tenant's fixtures, furniture, and effects now being in and upon the same, except the stock in hand, which is to be taken at a valuation in the usual way,) of the premises known as the Wheat Sheaf Tavern aforesaid, of which said purchase-money Moeser has paid 80*l.* on the signing hereof to Wisker as mortgagee as aforesaid. An abstract of the title to be delivered within one week from the date hereof; and all objections in respect of the title on the part of the purchaser to be delivered to the vendor's solicitor within seven days from the day of the delivery of the abstract, and in this respect time to be the essence of the contract; and, in default of such objections being delivered as aforesaid, the purchaser shall be deemed to have accepted the title. Possession of the premises shall be retained and the outgoings discharged by the vendor up to the 8th of August next, when the purchase shall be completed by payment of the balance of the purchase-money to Wisker as such mortagee as aforesaid; and as from that day the purchaser shall have possession, and pay the rents and outgoings in respect of the premises. If from any cause the purchase shall not be completed on the 8th of August next, the purchaser shall pay interest on the remainder of his purchase-money at the rate of 5*l.* per cent. from that day until the purchase shall be completed. The title shall commence with the lease under which the vendor holds; and the purchaser shall not call for the production of or investigate or make any objection or requisition in respect of the title of the lessor or the right to grant the lease; and the production of a

1871

MOESER v. WISKER.

receipt for the last payment of rent accrued previously to the completion of the purchase shall be conclusive evidence that all the covenants and conditions in the lease have been performed and observed up to the completion of the purchase. The expense of the production, inspection, and examination, and of making and furnishing abstracts of all deeds, documents, evidences and muniments of title (if any) not in the vendor's possession, and of obtaining, making, and producing all office, attested, and other copies of or extracts from records, registers, deeds, wills, probates, letters of administration, and other documents, whether in the vendor's possession or not, and of obtaining any information not in the vendor's knowledge, whether such production, inspection, examination, copies, extracts, certificates, or other evidence or information shall be required for the completion or verification of the title or abstract, or for any other purpose, shall be borne by the purchaser; and the purchaser shall also bear the expense of all searches, inquiries, and journeys for the above purposes or any of them. The property is believed and shall be take to be correctly described, and is sold subject to all rents, rights, and easements charged or subsisting thereon; and, if any error, misstatement, or omission in the particulars shall be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendor in respect thereof. If the purchaser shall insist on any objection or requisition as to the title or abstract or evidence of title, particular, conditions, conveyance, or otherwise, which the vendor shall be unable or unwilling to remove or comply with, the vendor may by notice in writing to be given to the purchaser or his solicitor at any time, and notwithstanding any negotiation or litigation in respect of such objection or requisition, annul the sale, and shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatever. If the purchaser shall fail to comply with the above conditions, his deposit shall thereupon be forfeited to the vendor, and the vendor shall be at liberty to re-sell the property, either by public auction or private contract, at such time, in such manner, and subject to such conditions as he shall think fit, and the deficiency in price (if any) which may happen on, and all expenses attending, such second sale shall immediately afterwards be paid by

the defaulter to the vendor, and, in case of non-payment, shall be recoverable by the vendor as liquidated damages."

At the trial before Montague Smith, J., at the sittings in Middlesex after last term, it appeared that the plaintiff, being unable or unwilling to complete the purchase, refused to execute the above agreement when tendered to him; and that the defendant thereupon insisted that the deposit was forfeited, and resold the premises for the same price.

On the part of the plaintiff it was submitted that, under the agreement contained in the receipt of the 23rd of July, he was entitled to have tendered to him an agreement containing usual and reasonable stipulations; and that some of those in the document above set out did not fall within that description, and therefore he was entitled to recover back his deposit.

The learned judge so directed the jury, and they returned a verdict for the plaintiff, damages 80*l.* He reserved leave to the defendant to move to enter a verdict for him, if the Court should think the ruling wrong.

Jan. 7. *Parry, Serjt.*, moved accordingly. The plaintiff having unreasonably refused to complete the purchase, the defendant was justified in re-selling and retaining the deposit.

[BRETT, J. Must there not be a special agreement to that effect, to warrant the vendor's retaining the deposit?]

There was no express stipulation in *Depree* v. *Bedborough.* (1) It is true, that was the case of a sale under the direction of the Court of Chancery; but that makes no difference.

BOVILL, C.J. I am of opinion that the agreement which the defendant's solicitor required the plaintiff to sign was unreasonable and not warranted by the terms of the receipt. When property is offered for sale by auction, such stipulations as these might be reasonable; the intended purchaser need not bid, if he does not like them. But the case is very different where the deposit is paid upon an understanding that a contract is to be signed, without any agreement as to what particular conditions it shall contain. The defendant was not justified in requiring the plaintiff

(1) 4 Gif. 479; 33 L. J. (Ch.) 134.

1871

MOESER v. WISKER.

to accept conditions that are unusual or unreasonable. To insist that the purchaser shall pay the expenses of the investigation of the vendor's title, is manifestly unreasonable. Upon that short ground, I think there should be no rule.

MONTAGUE SMITH, J. I thought at the trial, and still think, that several of the stipulations in the agreement in question were unreasonable, and such as the defendant could not call upon the plaintiff to assent to. The deposit was paid on the faith that the agreement to be prepared should contain none but usual and reasonable terms. The plaintiff's solicitor having objected to the contract tendered, the defendant insisted upon his right to re-sell the premises unless the plaintiff would execute it: and he did re-sell, and that without a loss. I think the condition pointed out by my Lord, that the purchaser shall bear the expense of investigating the vendor's title was under the circumstances unreasonable. I also think the condition that, if the purchaser shall insist on any objection or requisition as to the title, &c., which the vendor shall be unable or unwilling to remove or comply with, the vendor may by notice, at any time, and notwithstanding any negotiation or litigation in respect of such objection or requisition, annul the sale, is most unreasonable. It would give the defendant a right to retire from the bargain upon any objection, however reasonable, being made to the title. It is an attempt to bind the purchaser, and to leave the vendor entirely loose. The plaintiff was only under obligation to sign such a contract as was usual and reasonable, and this the defendant never tendered.

BRETT, J. It is not necessary to consider whether or not the vendor has a right to retain the deposit without an express stipulation to that effect; because here no reasonable agreement was tendered for the purchaser's acceptance. The purchaser having a right to reject that which was tendered, and the defendant having re-sold the property, the deposit must be returned.

Rule refused.

Attorney for defendant: *N. Bennett.*

THORPE *v.* ADAMS AND OTHERS.

1871
Jan. 18.

Statute, Construction of—Effect of subsequent general upon prior particular Legislation—Rateability of Serjeants' Inn—3 & 4 *Wm.* 4, *c.* cx.—*Representation of the People Act*, 1867, 30 & 31 *Vict. c.* 102, *s.* 7—*Poor Law Amendment Act*, 1868, 31 & 32 *Vict. c.* 122, *s.* 27.

The general principle to be applied to the construction of Acts of Parliament is, that a *general* Act is not to be construed to repeal a previous *particular* Act, unless there is some express reference to the previous legislation on the subject, or unless the two Acts are necessarily inconsistent.

Disputes having arisen between Serjeants' Inn and the parish of St. Dunstan as to whether or not the Inn was part of that parish and liable to the parochial burthens there, it was agreed, under the sanction of a private Act of Parliament (3 & 4 Wm. 4, c. cx), that the Inn should pay the parish 80*l.* a year, and that the parish should accept that sum as "a full satisfaction and discharge of all poor-rates from time to time due or claimed to be due in respect of the said Inn:"—

Held, that this special bargain was not repealed or affected by s. 7 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), or s. 27 of the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), or by any of the intermediate general Acts for the regulation of parishes or the assessment or collection of poor-rates therein.

REPLEVIN for taking certain goods and chattels of the plaintiff. By consent of the parties and of the Hon. Society of Judges and Serjeants-at-Law incorporated by 3 Wm. 4, c. cx, and by judge's order, the following case was stated for the opinion of the Court:—

1. The plaintiff is an occupier of chambers in Serjeants' Inn, Chancery Lane, as tenant to the society; and the defendants are the churchwardens and overseers of the poor of the parish of St. Dunstan-in-the-West, in the city of London.

2. By a supplemental valuation list prepared by the defendants under the provisions of the Union Chargeability Act, 1861 (24 & 25 Vict. c. 55), and the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), the defendants assessed the society and their tenants upon a gross estimated rental of 2125*l.*, and a rateable value of 1700*l.*

3. The plaintiff did not appeal against the rate.

4. The distress in question was levied in consequence of the non-payment of the rate; and this action was thereupon brought.

5. Previously to the year 1833, disputes had arisen between the

1871

THORPE v. ADAMS.

parish of St. Dunstan and the authorities of Serjeants' Inn, Chancery Lane, and of Serjeants' Inn, Fleet Street, as to whether those respective Inns were or were not parcel of the parish of St. Dunstan; and the result of litigation was, that, while in 1824 the parish obtained a verdict against Serjeants' Inn, Chancery Lane (1), on an exactly, or nearly exactly, parallel set of facts, Serjeants' Inn, Fleet Street, obtained a verdict against the parish. (2)

6. In this state of things, Serjeants' Inn, Chancery Lane, in 1833, obtained an Act of Parliament in the preamble whereof it was recited as follows: "Whereas a question has of late years been raised whether the said Inn is or is not parcel of the parish of St. Dunstan, and also whether the members of the society of the same Inn, or any of them, or other occupiers of chambers within the said Inn, are or are not in respect of their occupation thereof liable to contribute to the rates raised for the relief and maintenance of the poor, and to the church-rates and other parochial burthens, and whether the said members or occupiers are or are not liable to be called upon to fill parochial offices, and the said questions have already occasioned litigation between the parish and the said society, and further litigation is likely to arise thereon:" "And whereas, in order to prevent further litigation and expense, it hath been agreed between the society and the churchwardens and overseers that the society should pay the churchwardens for the time being of the parish the clear annual sum of 50*l.* to be applied by them for the purposes of a therein-recited Act (10 Geo. 4, c. 96), and of any church-rate or church-rates in the parish, whether raised by virtue of the recited Act or otherwise, and to pay to the overseers of the poor for the time being of the parish the further clear annual sum of 80*l.* to be applied by them to the relief of the poor thereof; which several sums of 50*l.* and 80*l.* should be and be deemed a full satisfaction and discharge of all church-rates and poor-rates and other parochial rates, assessments, or burthens from time to time due or claimed to be due in respect of the said Inn, or the chambers or other erections or buildings thereof; and that the said Inn and all

(1) See *Lens* v. *Browne*, 1 C. & P. 224.

(2) See *King* v *Butterworth*, 2 C. & P. 391.

chambers, &c., within the same, and the several owners, inhabitants, and occupiers thereof (as far as regards their being such owners, occupiers, or inhabitants) should be exempt as well from church-rates and poor-rates as from all or any other rates, assessments, or burthens within or for the said parish, and from all liability to serve parish offices, and from all other parochial interference and all parochial burthens whatsoever, to the utmost extent to which the said parties are competent to consent."

7. By this Act it was enacted (s. 5) that the society should pay the 50*l.* and 80*l.* annually to the overseers of St. Dunstan for the time being.

8. The society were impowered by the same Act (s. 13) to levy rates in payment of the sum of 80*l.*, so agreed to be paid by way of compromise.

9. This sum continued to be duly paid by the society, to the parish, up to the time of the rating hereinbefore mentioned.

10. By 20 Vict. c. 19, intituled, "An Act to provide for the relief of the poor in extraparochial places," it was by s. 1 enacted that every extraparochial place should, for (amongst other matters) the assessment to the poor-rate, be deemed a parish; and the Act required overseers to be appointed for such place.

11. By s. 7 it was provided that nothing above contained should apply to any extraparochial place in respect whereof there should be any agreement with any parish as to the liability of such place to contribute to the poor-rate of such parish contained in any Act of Parliament.

12. The 24 & 25 Vict. c. 55, s. 9, recites that it is expedient to alter the mode in which the contributions of parishes to the common fund of the union in which they are comprised are now calculated; and enacts that, "after the 25th day of March next, the several parishes comprised in any union already formed or hereafter to be formed under the provisions of 4 & 5 Wm. 4, c. 76, shall contribute to the common fund thereof in proportion to the annual rateable value of the lands, tenements, and hereditaments in such parishes respectively assessable by the laws in force for the time being to the relief of the poor, and in no other manner, whether the lands, tenements, and hereditaments shall be actually rated or not, and whether the rates levied shall be collected in full

1871

THORPE v. ADAMS.

or upon any composition: Provided always that nothing herein contained shall alter or affect the liability of any parish comprised in any such union, in regard to any charge lawfully created in the said union, and secured upon the poor-rates of all or any of the parishes comprised therein, which shall have been created at any time previous to the said 25th day of March; but the same shall continue to be charged and payable in like manner as it would by law have been charged and payable if this Act had not been passed: Provided also that nothing herein contained shall apply to any contribution which shall be in arrear from any parish in such union on the said 25th day of March; but the same shall be recoverable and shall be applicable in the same manner as if this Act had not been passed."

13. By 25 & 26 Vict. c. 103, s. 30, it was further provided that, "when the assessment committee for any union shall have approved valuation lists for all the parishes comprised within such union, the guardians of such union, in computing the amount of contribution to the common fund for the several parishes, shall thenceforward take the annual rateable value of the property in such parishes respectively from the valuation lists for the time being lastly approved of for such parishes respectively, any statute to the contrary notwithstanding: Provided that, in case any parish comprised in any union shall receive any sum of money as a contribution in aid of the poor-rate of such parish for or in respect of government property within such parish, and used for public purposes, the annual value of such property, according to the estimate (if any) of such value on which the amount of the sum of money so received is computed, or, if there be no such estimate, then the annual value of such property, estimated in the mode provided by the Act 6 & 7 Wm. 4, c. 96 (s. 83), for making an estimate of the annual rateable value of property liable to be rated to rates for the relief of the poor, shall be included by the overseer or overseers in the valuation list of such parish, and shall be added to the annual rateable value of the property in such parish, in computing the amount of contribution to the common fund for the several parishes in such union."

14. By s. 36 of the same Act it was provided, amongst other things, that nothing therein contained should render liable to be

rated according to the annual value thereof any property which under any local Act or otherwise is entitled to be rated upon a fixed amount or according to any special or exceptional principle of valuation.

15. By s. 7 of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102, it was enacted that, after the passing of that Act, no owner of any tenement situate in a parish wholly or partly in a borough should be rated to the poor-rate instead of the occupier, except as thereinafter mentioned.

16. The parish of St. Dunstan-in-the-West is situated within the electoral limits of the city of London.

17. The 27th section of the Poor Law Amendment Act, 1868, 31 & 32 Vict. c. 122, enacts that, "from the 25th day of December next, every place which was or is reputed to be extraparochial, whether entered by name in the report upon the census for the year 1851 or not, for which an overseer has not been then appointed, or for which no overseer shall be then acting, or which has not been then annexed to and incorporated with the next adjoining parish, &c., shall for all civil parochial purposes be annexed to and incorporated with the next adjoining parish with which it has the longest common boundary."

18. There was on the 25th of December, 1868, no overseer appointed and no overseer was then acting for Serjeants' Inn, Chancery Lane; and St. Dunstan's is the next adjoining parish with which it has the longest common boundary.

19. The plaintiff contends that the special provisions of the Act of 1833 are not affected by any of the subsequent general legislation set forth above, as this legislation is neither expressly nor by necessary inference inconsistent with those provisions.

20. The defendant contends,—first, that, if the Inn is extraparochial, the general legislation as to extraparochial places overrides the special Act, and renders the Inn liable to be rated at its real value,—secondly, that, if it is in the parish, the 7th section of the Representation of the People Act equally overrides the special Act.

If the Court should be of opinion that the said provision for a fixed payment is by the said Acts, or any of them, repealed, judgment is to be entered for the defendants, with costs. If the Court

1871

THORPE v. ADAMS.

should be of opinion that the said provision is not repealed, judgment is to be entered for the plaintiff, with costs. (1)

Tozer, Serjt. (*Poland* with him), for the plaintiff. It is a general rule in the construction of Acts of Parliament, that a special Act creating special rights, and enforcing special duties, can only be repealed by a subsequent general Act, by express words, or by such an implication as shews that the special Act was present to the mind of the legislature when the general Act was passed: *Gregory's Case* (2); *Williams* v. *Pritchard* (3); *Eddington* v. *Borman* (4); *London and Blackwall Ry. Co.* v. *Limehouse Board of Works* (5); *Great Central Gas Co.* v. *Clarke* (6); *Moody* v. *Corbett.* (7)

[BOVILL, C.J., referred to *Lyn* v. *Wyn.* (8)]

Applying that rule here, the question is whether there is anything in any of the subsequent general Acts which, either expressly or by necessary implication, can have the effect of repealing the special arrangement recited in and sanctioned by the Serjeants' Inn Incorporation Act, 3 & 4 Wm. 4, c. cx. Now, 20 Vict. c. 19, an Act to provide for the relief of the poor in extraparochial places, by s. 7 in terms excludes all cases of special agreement. The 9th section of 24 & 25 Vict. c. 55 (the Union Chargeability Act) does not affect the question of liability to be rated; and 25 & 26 Vict. c. 103, s. 30, contains a mere direction for carrying out the other Acts in a particular way. 30 & 31 Vict. c. 102, s. 7, relates only to the franchise, and was not intended to regulate the persons or the property to be rated. And 31 & 32 Vict. c. 122, s. 27, may have the effect of annexing the Inn to the adjoining

(1) In the case, as originally stated, two questions were presented for the opinion of the Court which on the argument were struck out by consent, viz.:

"1. Assuming the Inn to be extra-parochial, does the legislation above set forth render the Inn liable to be rated on a valuation, without reference to the Act of 1833?"

"2. Assuming the Inn to be within the parish, does the Representation of the People Act, 1867, repeal the provision for a fixed payment in lieu of a poor-rate, made by the Act of 1833?"

(2) 6 Co. Rep. 19.

(3) 4 T. R. 2.

(4) 4 T. R. 4.

(5) 3 K. & J. 123; 26 L.J. (Ch.) 164.

(6) 13 C. B. (N.S.) 838; 32 L. J. (C.P.) 41.

(7) 5 B. & S. 859; 34 L. J. (Q.B.) 166.

(8) Bridg. C. P. 122, 127.

parish of St. Dunstan, but cannot operate to repeal the bargain made with the parish in 1833.

Manisty, Q.C. (*Littler* with him), for the defendants. Prior to the passing of 3 & 4 Wm. 4, c. cx, the relative position of Serjeants' Inn and the parish was this,—the Inn claimed to be extraparochial, and the parish insisted that it formed part of St. Dunstan's and was rateable to the parochial burthens there. The rateability of the Inn had been affirmed in the case of *Lens* v. *Browne* (1); but the Inn did not acquiesce in that ruling; and, in order to avoid further litigation, it was arranged that the Inn should pay to the parish annually 50*l.* towards the church-rate and 80*l.* towards the relief of the poor. These payments were intended to exempt the Inn from liability to rates, but without prejudice to the question of parochiality or non-parochiality. Church-rates (compulsory) being now abolished (2), it will hardly be contended that the 50*l.* a year is still payable. Such being the state of things, how has the legislature dealt with it in the subsequent Acts? By 4 & 5 Wm. 4, c. 76, s. 26, the commissioners were impowered to form parishes into unions; by s. 109, "parish" was to include any extraparochial place; and by s. 28 it was provided that every parish should contribute to the common fund of the union in proportion to the number of its paupers; but, as there were no paupers in Serjeants' Inn, its inhabitants were unaffected by that provision. Then came 20 Vict. c. 19, s. 1, which made all extraparochial places parishes for the relief of the poor, and gave power to the justices to appoint overseers there. Under that Act, but for the proviso contained in s. 7, Serjeants' Inn would have been liable to contribute to the common fund of the union to which St. Dunstan's was annexed. 24 & 25 Vict. c. 55, s. 9, altered the mode of contribution to the common fund, making it to depend upon the rateable value of the property in each parish. Staple Inn unsuccessfully contested its liability under that Act: *Staple Inn* v. *Holborn Union*. (3) By means of that Act a new burthen is thrown upon the parish of St. Dunstan, inasmuch as the rateable value of the property therein would be materially enhanced by its including Serjeants' Inn; and for this the stipulated payment of

(1) 1 C. & P. 224.
(2) 31 & 32 Vict. c. 109.
(3) 2 H. & C. 284; 32 L. J. (M.C.) 181.

1871

THORPE v. ADAMS.

80*l.* a year would be no equivalent. The 36th section of 25 & 26 Vict. c. 103, which provides for exceptional cases, clearly embraces Serjeants' Inn. Then comes the important provision applicable to this part of the case, viz. s. 27 of 31 & 32 Vict. c. 122, which enacts that every place which was or is reputed to be extraparochial, whether included by name in the report upon the census for the year 1851 or not, for which an overseer has not been appointed, or for which no overseer shall be acting, or which has not been annexed to and incorporated with an adjoining parish, shall for all civil parochial purposes be annexed to and incorporated with the next adjoining parish with which it has the longest common boundary. The effect of that section is, to make Serjeants' Inn a part of the parish of St. Dunstan for all civil parochial purposes, including the liability to bear parochial burthens. Admitting the general rule of construction to be as stated, the effect of the subsequent general legislation on the subject of rating is by necessary implication to repeal the bargain made in the Act of 1833. One object of the Act of 1868 was, to put an end to all these special agreements, except where they are by that Act specifically reserved. Then, assuming Serjeants' Inn to be parochial, the agreement is at an end by force of s. 7 of the Registration of the People Act, 1867, 30 & 31 Vict. c. 102, which enacts, in sub-s. 1, that, "after the passing of this Act, no owner of any dwelling-house or other tenement, &c., shall be rated to the poor-rate instead of the occupier," and in sub-s. 2, that "the full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate-book." By that provision the whole principle of rating is altered. The language is general.

[BOVILL, C.J. The matter intended to be dealt with there was the acquisition of the franchise,—to prevent the loss of a vote by reason of the owner being rated instead of the occupier.]

Tozer, Serjt., in reply.

BOVILL, C.J. In this case we were asked to answer certain questions upon the assumption, in the first place, that the property was extraparochial, and, in the second place, that it was parochial. But there is another general question, viz. whether

the Act of 1833 (3 & 4 Wm. 4, c. cx) has been affected by subsequent legislation; and it seems to me that, for the purpose of determining this case, it is not necessary now to assume, or at any future time to decide, whether the property was parochial or not, or whether it is so at the present moment. If the property be parochial, that is to say, if the Inn is part of the parish of St. Dunstan, then it is conceded on all hands that the agreement recited in that Act of Parliament remains in full force, unless it has been interfered with by the Representation of the People Act, 1867, 30 & 31 Vict. c. 102. I confess I am utterly at a loss to understand how that statute could have any application to the question of rating between the parish and Serjeants' Inn. There are, it is true, some very general expressions in s. 7 of the Act: but we must look at what was the object of the legislature in that enactment. The Act required that occupiers claiming the franchise should be rated to the relief of the poor. In many parishes, there was power to rate the owner instead of the occupier; and in many instances the property was rated at less than its full value, under the Small Tenements Act (13 & 14 Vict. c. 99); and the legislature then altered the law with regard to the rating of owners instead of occupiers,—requiring the latter and not the owner to be rated, and to be rated, not at the sum at which the owner had been rated, but at what was the full rateable value of the premises. That was the main scope and object of that part of s. 7 of the Act of 1867 which has been relied upon. The legislature was dealing with the franchise, and with the question of rating only so far as it affected the exercise of the franchise; and I cannot for an instant conceive that by the 7th section they contemplated making property rateable which was previously exempted from being rated, or imposing a liability on property to be rated where neither owner nor occupier was before liable to be rated in respect of it. The first part of s. 7 clearly deals with questions of rating where the owners were rated instead of the occupiers. That is not this case. In Serjeants' Inn, by the Act of 1833, and the agreement recited in and sanctioned by that Act, there could be no rates levied by the parish of St. Dunstan. The persons who contracted to pay the annual sums mentioned in that Act were not the owners or occupiers of property there, but the Society of Serjeants' Inn; and the

1871

THORPE v. ADAMS.

society had power (by s. 13) to make rates upon its members or the occupiers of chambers in the Inn for their reimbursement; but that was not merely for the sums to be paid to the parish, but was also for moneys to be paid to the Bishop of Ely. Then, the second part of s. 7 deals with the amount at which the parties are to be rated, and says that "the full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate-book." So far as this point is concerned, the part of the section relied upon seems to me to deal with the value to be put on the rate-book, but not in the slightest degree to change the character of the property liable to be rated, or to affect persons who were previously exempt.

There being, then, nothing in that Act of Parliament which could disaffirm the agreement entered into in 1833 between the parish and the society, the Act of 1833 must stand, unless it has been repealed by the Act of 1868, 31 & 32 Vict. c. 122. Now, how does the matter stand with reference to that statute? The decision in *Lens* v. *Browne* (1) was, that the Inn was parochial. The society refused to acquiesce in that decision, and then this agreement or composition was entered into for the purpose of putting an end to further litigation. If the Inn be parochial, the Act of 1867 not interfering with the Act of 1833, there is no Act of Parliament to affect the arrangement then entered into. Now, what was the effect of the Act of 1868? The object with which s. 27 of that Act was framed seems to me to have been merely to bring property which was extraparochial within the local area of the parish for all civil as contradistinguished from ecclesiastical purposes. If, therefore, Serjeants' Inn be really within the parish of St. Dunstan, it would not be affected by the Act of 1868, because this latter Act has no reference to districts which are within parishes. If Serjeants' Inn was not within the parish, then, for certain purposes, that is, for all civil purposes, it would be brought within the area of St. Dunstan's. But, in that case, how could the Inn and the parish be by this Act in a different position from that in which they would have been if the Inn had always formed part of the parish? And, if always part of the parish, it is clear the agree-

(1) 1 C. & P. 224.

1871

THORPE v. ADAMS.

ment would remain. The Act of 1868 really does not affect the question. The object of s. 27 was merely to bring extraparochial places within the area of the parishes with which they had the longest common boundary; and I find no intimation in that Act of the slightest intention to repeal or alter any private Acts of Parliament or any prior special legislation, or to change the principle of rating or the liability of the persons to be rated. It might possibly be urged that the general expression "all civil parochial purposes" would include the liability to be rated. But the general principle to be applied to the construction of Acts of Parliament is, that a *general* Act is not to be construed to repeal a previous *particular* Act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two Acts standing together. It seems to me that there is no inconsistency in holding that since the statute of 1868 Serjeants' Inn is to be deemed to be within the parish of St. Dunstan, and yet that the question of contribution to the parish of St. Dunstan should still remain as settled by the Act of 1833. The rule with respect to general Acts of Parliament and their effect upon previous particular statutes is well laid down by the present Chancellor in the case referred to of *Fitzgerald* v. *Champneys*. (1) The authorities on the subject are very numerous; and I will content myself with referring very shortly to one or two. In *Lyn* v. *Wyn* (2), a very important case with respect to ecclesiastical leases, it is said by Sir Orlando Bridgman, C.J., "The law will not allow the exposition to revoke or alter, by construction of *general words*, any *particular* statute, where the words may have their proper operation without it." In this case it seems to me that the words of the 27th section of the Act of 1868 may have their proper operation without repealing the Act of 1833, and that the last-mentioned Act may stand consistently with the enactment contained in this section. I would also refer to *Dr. Foster's Case* (3), where there is this passage: "Only it must be known that, forasmuch as Acts of Parliament are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, they ought not by any constrained

(1) 2 J. & H. 31; 30 L. J. (Ch.) 777. (2) Bridg. C. P. 127.
(3) 11 Co. Rep. 63.

1871

THORPE v. ADAMS.

construction out of the general and ambiguous words of a subsequent Act to be abrogated." It is impossible to say that the words here relied on as repealing the Act of 1833 are anything more than ambiguous; and, when we look at the mode in which Acts of Parliament are passed, it cannot be presumed or conceived that the legislature had had brought to its consideration all the special Acts and legislation which affect companies or individuals; and that is one reason for the adoption of the general principle I have adverted to.

Upon the whole, therefore, it seems to me that there is no necessary inconsistency or incongruity between the two Acts in question, that the Act of 1868 may well be construed without affecting the Act of 1833, and that this latter Act stands unrepealed. Our judgment, therefore, in my opinion, must be for the plaintiff.

WILLES, J. I am of the same opinion. With respect to the effect of the Act of 1868, Mr. Manisty's argument for some time impressed me with the notion that it rested upon the plaintiff, upon the footing of the original contention that Serjeants' Inn was extraparochial, to shew that the continuance of the agreement recited in and confirmed by the Act of 1833 was consistent with the 27th section of the Act of 1868. What chiefly obstructed me in that direction was the consideration of the injustice which would result from following that argument to its legitimate conclusion; for, assuming, contrary to what was decided in *Lens* v. *Browne* (1), that the Inn was extraparochial, upon that hypothesis, the society has for the purpose of buying off the litigation with the parish paid them 80*l.* a year for thirty-seven years, making a sum (exclusive of interest) of 2960*l.*, which the society was not bound to pay at all. It would be an extreme measure to hold that, after having paid that large sum, they are now to be deprived of the benefit of the bargain. Nevertheless, this hardship and injustice would afford no ground for disobeying the legislature, if they have in clear and unambiguous terms declared that the Inn shall be liable to be rated for the future. It seems to me, however, that the argument is fallacious. Take the case as matters stood before the passing of 3 & 4 Wm. 4, c. cx. There was then a dispute between the parish and the Inn as to whether or not

(1) 1 C. & P. 224.

1871

THORPE v. ADAMS.

the society was liable to be rated to the relief of the poor of St. Dunstan's,—a burthen which might be more or less than 80*l.* a year, but which probably was more, because the agreement recited in the Act bears the appearance of a compromise where each party gave way somewhat, the society being liable to the burthen if the Inn was parochial, but not liable if it was extraparochial. It was under that state of circumstances that the agreement was made, viz. to settle a dispute and put an end to litigation; and the agreement bears the stamp of being intended to last for ever. Whether parochial or not, the Inn was for all time to pay to the parish 80*l.* a year in lieu of poor-rates. It was an agreement, therefore, which provided for the case of the Inn being either parochial or extraparochial. Under these circumstances, the legislature passed the Act of 1868, 31 & 32 Vict. c. 122, the general scope of which is this, that extraparochiality is an inconvenience, and that for the future all places shall be rendered parochial. If the place be parochial, then it is unnecessary to make any enactment with respect to it; whereas, if it be extraparochial, or reputed to be extraparochial, it shall for the future be brought within a parish. Taking, therefore, the general intention of the legislature, it is only necessary to apply its language to the case of extraparochiality or to places which were reputed to be extraparochial: there was no intention to impose any novel burthen upon the land by reason of its being extraparochial, but merely to place it in the same position with regard to parochial burthens as if it had been from all time parochial. Now, if Serjeants' Inn had been from all time parochial, there would be nothing inconsistent in its forming part of the parish of St. Dunstan, and its inhabitants being by reason of special enactment relieved from being assessed to the poor-rates, in consideration of their paying that which would be analogous to a modus in the case of tithes. That appears to me to be the true condition of the question. In order to hold that the Act of 3 & 4 Wm. 4, c. cx, is repealed, we must hold it to be inconsistent with the Act of 1868, whether the Inn was parochial or non-parochial: and it appears to me to be impossible to hold that.

With regard to the Representation of the People Act, 1867, 30 & 31 Vict. c. 102, I must observe, as I have had occasion to observe upon former occasions when the provisions of that Act

1871

THORPE v. ADAMS.

have been under discussion in this Court, it seems to me to deal, not with any new class of persons or any new class of property, but to deal with property as it existed at that time, only defining the interest which was to confer the franchise in future as being an interest of a less important character than that which was before required to give the franchise. Then, the special clause introduced in the 7th section was introduced for the purpose of so distributing the rate which was previously imposed upon property as that the persons who had the lesser interest to which the franchise was annexed by the Act of Parliament would in respect of their being rated be entitled to vote for members under that section. That was the sole intention of the legislature, and not to extend the liability to be rated to persons who were not liable before. It was never meant to interfere with arrangements such as that between this Inn and the parish. I do not think it necessary to go into the general question as to the effect of general enactments inconsistent with prior special enactments affecting particular persons or places or circumstances. The good sense of the law as laid down by my Lord is quite obvious: because, if a bill had been brought into parliament to repeal the local Act, it never would have been allowed to pass into a law without notice to the parties whose interests were to be affected by it, and opportunity being given to them to be heard in opposition to it, if necessary; whereas, a general provision in a public Act is discussed with reference to general policy, and without any reference to private rights with which there is no intention on the part of the legislature to interfere.

The conclusion, therefore, at which I have finally arrived is, that the Act of 3 & 4 Wm. 4, c. cx, which was intended to be and is a continuing and binding arrangement between the parish of St. Dunstan and the Inn, is not affected by any of the subsequent general provisions as to rating in the Acts of Parliament referred to.

MONTAGUE SMITH, J. I am of the same opinion. The effect of the agreement of 1833, which was ratified and confirmed by the Act of 3 & 4 Wm. 4, c. cx, was, to establish a special status for Serjeants' Inn in its relation with the parish of St. Dunstan,—a status which left it neither strictly and entirely parochial nor altogether extraparochial; because, the effect of that arrangement

1871

THORPE v. ADAMS.

was, that, though the Inn was not to be assessed like the rest of the parish, it was still to contribute to the relief of the poor of St. Dunstan. That state of things arose in this way:—The parish insisted that Serjeants' Inn was part of St. Dunstan's; the society insisted that it was not. The matter was the subject of litigation between them; and in the only case which was tried, viz. *Lens* v. *Browne* (1), the parish had been successful at nisi prius: and, with a view to put an end to the dispute, and to avert further litigation, and to establish a peculiar and special position for the Inn, an agreement was come to between the society and the parish that two sums of 50*l.* and 80*l.* should be paid by the former to the latter, the first for the support of the church, and the second towards the maintenance of the poor of the parish, which payments were to be deemed to be "a full satisfaction and discharge of all church-rates and poor-rates and other parochial rates, assessments, and burthens from time to time due or claimed to be due in respect of the said Inn or the chambers or other erections or buildings thereof." And then a further part of the agreement was, that "the said Inn and all chambers, erections, buildings, messuages, lands, tenements, and hereditaments within the same, and the several owners, inhabitants, and occupiers thereof (as far as regarded their being such owners, occupiers, or inhabitants), should be exempt, as well from church-rates and poor-rates as from all or any other rates, assessments, or burthens within or for the said parish, and from all liability to serve parish offices, and from all other parochial interference and all parochial burthens whatsoever, to the utmost extent to which the said parties were competent to consent." Now, as it might not otherwise have been competent to the parties so to contract, the agreement entered into between them was confirmed by parliament, and its provisions became law by force of the Act of 1833. The terms used in the Act shew that there was in some sense a relation of Serjeants' Inn to the parish. The Inn is not treated as being altogether extraparochial; the language is that, in consideration of the stipulated payments, the Inn is to be "exempt" from church-rates and poor-rates, and from performance of parochial duties, which expression "exempt" seems to assume that, if the parish had carried the litigation further, they might

(1) 1 C. & P. 224.

1871

THORPE v. ADAMS.

have succeeded in establishing that the Inn was parochial. They, however, chose to agree that the Inn should be put in a special and exceptional position; and that position the legislature consented to recognize and confirm. It may be that, having regard to the nature of the property in Serjeants' Inn, and the uses to which it was put, parliament might have thought it advisable to sanction an arrangement between the society and the parish which it might have hesitated to sanction in the case of property of an ordinary description and devoted to ordinary purposes. Be that as it may, there is this special legislation; and it must be admitted by the parish to be in force (for there is no limit in point of time to the effect to be given to it), unless it has been repealed by some subsequent legislative provision: and I am of opinion that the Acts which have been referred to did not repeal this special legislation. Now, the Poor Law Amendment Act, 1868, 31 & 32 Vict. c. 122, would, if the Inn were extraparochial, bring it within the adjoining parish; but, if it was within the parish before, that Act would have no operation at all upon the Inn. In the view I take of this case, it seems to me to be unnecessary to decide whether the Inn was originally within the parish or extraparochial, because the legislation in the Act of 1833 is founded upon the doubt which then existed, and the existence of that doubt was the cause of the agreement being entered into. It may be that it would be impossible now to decide that question; because, when the Inn and the parish came to terms, and those terms were sanctioned and carried into complete effect by the legislature, it may be that the evidence which would have determined it one way or the other was no further regarded and may be no longer obtainable. However, the Inn is now undoubtedly a part of the parish of St. Dunstan, whether it was so originally or was brought into it by the Act of 1868. But it seems to me that an enactment which brings extraparochial places within the adjoining parishes for all civil parochial purposes, is not inconsistent with the existence of this special status of Serjeants' Inn; and I cannot collect from the statute any intention on the part of the legislature to abrogate such a state of things as exists in this case. This is all that I think it necessary to say with respect to the Act of 1868. Mr. Manisty has contended, that, assuming Serjeants' Inn to have been

part of the parish of St. Dunstan, then the Representation of the People Act, 30 & 31 Vict. c. 102, has made the property therein rateable, notwithstanding it was by the special Act exempted from rateability. I cannot agree with that contention. It seems to me that that Act was passed for a totally different purpose. Its object was to put a stop to the practice of rating the owners of property instead of the occupiers, and to require the full value to be inserted in the rate. If the argument were well founded, it must go the length of applying the statute to such cases as the case of land which had been recovered from the Thames (1), and which the legislature provided should not be rated, because the general words are large enough of themselves to include such cases. I do not think that was the intention of the Representation of the People Act, and therefore, in my view, this case is unaffected by it. In the result, I agree with the rest of the Court that our judgment must be for the plaintiff.

BRETT J. By the particular Act of 1833, it is enacted, in effect, that, whether parochial or extraparochial, the Inn shall for ever hereafter pay 80*l.* a year to the parish. That, in other words, is: if parochial, you shall pay 80*l.*; if extraparochial, you shall pay 80*l.*; if it remain undetermined whether you are parochial or extraparochial, you shall pay 80*l.* Now, if it be taken that the Inn is parochial, it is admitted that the Poor Law Amendment Act, 1868, does not interfere with the liability to pay the 80*l.* But also, if parochial, the Representation of the People Act, 1867, in my opinion, however read, does not interfere with the liability. It is not inconsistent with the existence and applicability of the agreement. If the Inn is taken to have been extraparochial, the Act of 1868 makes it parochial. But then, taking it to have been parochial, it has already been shewn that the agreement is not interfered with. If it is to be taken that it is to remain undetermined whether the Inn is parochial or extraparochial, then none of the statutes alluded to can be applied to it. It is not within the terms of any of them.

Judgment for the plaintiff.

Attorneys for plaintiff: *J. & C. Cole.*

Attorneys for defendants: *J. & M. Pontifex.*

(1) See *Williams* v. *Pritchard*, 4 T. R. 2; *Eddington* v. *Borman*, 4 T. R. 4.

1871
Jan. 31.

BANQUE DE CREDIT COMMERCIAL *v.* DE GAS.
LAZARD, Garnishee.

Lord Mayor's Court, London—Foreign Attachment—Bill of Exchange payable in London.

Bills of exchange were drawn and accepted abroad, and indorsed by the defendant abroad, one of them being payable in London, the others in Liverpool. The plaintiffs, foreign bankers, having no residence or place of business in London, as indorsees of the bills, sued the defendant (who likewise had no residence or place of business in London) in the Mayor's Court, and attached moneys of the defendant in the hands of the garnishee, a banker in London:—

The Court made absolute a rule for a prohibition; holding, upon the authority of *Mayor of London* v. *Cox* (Law Rep. 2 H. L. 239), that the Mayor's Court had no jurisdiction, the cause of action not arising within the city, and the parties to the suit being both resident abroad.

On the 23rd of December, 1870, the Banque de Credit Commercial, of Antwerp, commenced an action in the Mayor's Court, London, against the defendant, and issued an attachment in the action to attach all such moneys, &c., as the garnishee then had or as thereafter should come into his hands belonging to the defendant. The action was brought to recover 1300*l.* due on three bills of exchange, two for 500*l.* each drawn abroad by one Dreyfus, and accepted abroad by one H. Allaire, payable to the order of the defendant, and the third for 300*l.* drawn abroad by one Leucholt, and accepted abroad by one H. Musson, payable to the order of the drawer, and indorsed by him to the defendant. The three bills were indorsed by the defendant at Paris, and were subsequently indorsed there to the Banque de Credit of Antwerp. Two of the bills were made payable in Liverpool, and the third at the banking-house of Lazard, the garnishee, at No. 11, Moorgate Street, in the city of London. There were moneys of the defendant in the hands of the garnishee exceeding the amount of the bills. The defendant had not and never had any place of domicil in England and had never lived there, but his place of domicil and permanent residence was at Paris, and neither the plaintiffs nor the defendant were at any time citizens or resident within the city of London.

Murphy obtained a rule, on behalf of the garnishee, to shew

1871

BANQUE DE CREDIT COMMERCIAL v. DE GAS.

cause why a writ of prohibition should not issue to the Mayor's Court, to prevent that court from further proceeding with the action or the garnishee proceedings, on the ground of want of jurisdiction.

Cohen shewed cause. The reasoning upon which the judgment of the House of Lords in *Mayor, &c., of London* v. *Cox* (1) is founded does not apply to the case of an action upon a bill of exchange. A bill of exchange being a negotiable instrument, the acceptor or indorser is liable to be sued upon it anywhere.

[BRETT, J. To entitle the plaintiff to an attachment, two things must concur, viz. that the cause of action, that is, the whole cause of action, arose within the city, and that the person in whose hands the moneys or the goods are attached, the garnishee, as he is called, resides within the city.]

If a man accepts or indorses a bill of exchange which is made payable in London, he must be assumed to undertake that there shall be funds in London to meet the bill at maturity. There is, therefore, no violation of natural justice in holding him to be amenable to the process of foreign attachment. Lord Cranworth, in the case referred to, founds his judgment upon the fact that the attachment is only ancillary to the cause of action. If there be any doubt, the Court will not make the rule absolute, but will leave the defendant to declare in prohibition.

Brown, Q.C., and *Murphy*, were not called upon.

MONTAGUE SMITH, J. Mr. Cohen has said all that could be said in favour of his view; but he has failed to satisfy the Court that he is entitled to have this rule discharged. The Lord Mayor's Court is a local court, having no jurisdiction in matters which do not arise within the city of London. That is the general principle upon which the decision of the House of Lords in *Mayor of London* v. *Cox* (1) is founded; and it embraces every description of action, including actions on bills of exchange. In the present case it appears that neither the plaintiffs nor the defendant reside in London; and, further, that the cause of action did not arise wholly within the city of London. The case, therefore, is clearly governed by *Mayor of London* v. *Cox*. (1) It would be idle, after the full

(1) Law Rep. 2 H. L. 239.

1871

BANQUE DE CREDIT COMMERCIAL v. DE GAS.

discussion the question of jurisdiction of the Mayor's Court underwent in that case before the highest tribunal of the country, for this Court to entertain the matter again. The rule must be made absolute in its terms.

BRETT, J. Two things were decided in *Mayor of London* v. *Cox* (1); 1. that the cause of action must arise, and the garnishee must reside, in London; 2. that a custom to attach money of the debtor merely because some one who owes him money happens to be within the city, is a bad custom. Here, everything that is required to give the Mayor's Court jurisdiction is wanting, except the fact that a debtor of the defendant resides in London. The plaintiff and the defendant are both resident abroad, and the cause of action arose abroad. Mr. Cohen, therefore, is trying to set up the very custom which the House of Lords, after full discussion and much deliberation, held to be a bad one. Notwithstanding the ingenious distinction which he has attempted to make between a liability upon a bill of exchange and other causes of action, I think the rule for a prohibition must be made absolute.

Rule absolute.

Attorneys for plaintiff: *Simpson & Cullingford.*
Attorney for garnishee: *T. W. Roffey.*

Jan. 31.

BYERLEY *v.* PREVOST.

Bill of Sale—17 & 18 *Vict. c.* 36—*Receipt for the Price of Goods—Past Debt.*

Upon the trial of an interpleader issue, the plaintiff, the claimant, to prove a sale of the goods to him, put in a (stamped) receipt, as follows:—

"Received of Mr. J. B. the sum of ninety pounds, being the amount agreed to be paid for the purchase of household furniture and effects on the premises, No. 94, &c., of which I have this day taken possession. G. E. B."

No money passed at the time; but the consideration for the giving of the receipt was a past debt; and the goods remained in the debtor's possession:—

Held, that the instrument did not require registration under the Bills of Sale Act, 17 & 18 Vict. c. 36.

INTERPLEADER issue to try whether certain goods seized by the sheriff of Surrey under a writ of fi. fa. against the goods of George

(1) Law Rep. 2 H. L. 239.

1871

BYERLEY v. PREVOST.

Ebenezer Byerley were at the time of the seizure the goods of John Byerley as against William Prevost, the execution-creditor.

At the trial, before Byles, J., at the third sitting for Middlesex in this term, the facts proved were as follows:—The sheriff having on the 21st of December, 1870, seized under the fi. fa. certain household furniture and effects in the possession of George Ebenezer Byerley, the execution-debtor, a claim was made on the part of the now plaintiff, the father of George Ebenezer Byerley, under a sale alleged to have been made to him by his son on the 14th of November preceding; and upon an interpleader summons this issue was directed.

The evidence in support of the plaintiff's claim was that his son was indebted to him for various sums of money lent to him from time to time, extending over several years; that, on the 14th of November, 1870, he went to his son, and insisted upon payment; that, being unable to comply with this demand, his son agreed to sell to him all the furniture and effects in his house in satisfaction of his debt, and a receipt was given in the following form, upon an ordinary receipt-stamp:—

"London, November 14th, 1870.

"Received of Mr. John Byerley the sum of ninety pounds, being the amount agreed to be paid for the purchase of household furniture and effects on the premises No. 94, Olney Street, Walworth Road, Surrey, of which I have this day taken possession.

"90*l.* 0*s.* 0*d.* "George Ebenezer Byerley."

The goods remained in the possession of the son, under an alleged agreement whereby they were let to him on hire at a rent of 1*l.* per month.

It was contended on the part of the defendant that the document above set out required registration under the Bills of Sale Act (17 & 18 Vict. c. 36), and that for want of such registration the sale was void as against the execution-creditor.

The learned judge left the question of bona fides to the jury, who returned a verdict for the plaintiff for the value of the goods; leave being reserved to move to enter a verdict for the defendant if the Court should be of opinion that the document required registration.

1871

BYERLEY v. PREVOST.

Kemp moved to enter a verdict for the defendant pursuant to the leave reserved. The document relied on by the plaintiff was clearly a bill of sale within the statute. By the interpretation clause, s. 7, "Bill of sale" is to include assignments, transfers, and other assurances of personal chattels, and also "licences to take possession of personal chattels as security for any debt." This document falls precisely within the description last mentioned.

[MONTAGUE SMITH, J. It is not a security for any debt; it is a sale out and out. A receipt very much like this was held in *Allsopp* v. *Day* (1) not to be a bill of sale.]

In that case the money was actually paid for the goods at the time. Here, however, no money passed; the consideration for the alleged sale of the furniture was a past debt, and the possession remained unchanged.

MONTAGUE SMITH, J. I think this case is governed by *Allsopp* v. *Day* (1), and that there should be no rule. The instrument in question is a receipt, and a receipt only, for the price of the goods. The only question reserved by my Brother Byles is whether it required registration under the Bills of Sale Act (17 & 18 Vict. c. 36). I am of opinion that it is not within the Act, and does not require registration. Our decision has nothing to do with the merits of the case.

BRETT, J., concurred.

Rule refused.

Attorney for defendant: *Apsley E. Briant.*

(1) 7 H. & N. 457; 31 L. J. (Ex.) 105.

STEVENS, PETITIONER; TILLETT, RESPONDENT. (1)

1870
Nov. 25.

NORWICH ELECTION PETITION.

Parliament—Election Petition—Report of Election Judge—Estoppel.

A. was a candidate at an election at which B. was returned. A. having petitioned against his return and claimed the seat, recriminatory charges were made. At the trial of the petition B. was proved guilty of corrupt practices by his agents, and decided by the judge not to have been duly elected, and after some of the matters contained in the recriminatory charges were gone into and not proved, B. withdrew the charge by permission of the judge, and A. then abandoned his claim to the seat, and the judge certified to the House of Commons that B. was not duly elected, and reported, amongst other things, that he believed the election on the part of A. to have been perfectly pure. At the election which ensued A. was returned, and a petition was presented against his return alleging that he had been guilty of corrupt practices by himself and his agents at the previous election at which B. had been returned, the matters intended to be relied on having been discovered since the former trial.

On a rule to strike out these allegations from the petition on the ground that the matters alleged might have been given in evidence in support of the recriminatory charges at the previous trial:—

Held, that the report of the judge at an election trial is not final and conclusive like his certificate as to the matters contained in it, and that the present petitioner was entitled to give evidence of the alleged corrupt practices.

RULE to shew cause why an order of Byles, J., at chambers, ordering the 5th and 6th clauses of the petition herein to be struck out, should not be rescinded.

From affidavits it appeared that at an election for the city of Norwich, in November, 1868, there were three candidates, Russell, Stracey, and Tillett (the present respondent), and that Russell and Stracey were returned. Tillett then presented a petition against the return of Stracey, and claimed the seat. Recriminatory charges were made under the 53rd section of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), and the petition, together with these recriminatory charges, was tried before Martin, B., on the 14th of June, 1869. The case against the sitting member having been first heard, and Martin, B. having decided that he was not duly elected, the recriminatory charges were then proceeded with. After three matters had been brought forward on which the evidence failed, the sitting member abandoned his recriminatory

(1) Decided in Michaelmas Term, 1870.

1870

STEVENS v. TILLETT.

charges with the consent of the judge, and Tillett then withdrew his claim to the seat. Martin, B., then certified to the speaker that Stracey was not duly elected, and that his election was void. The certificate was accompanied by a report, which contained the following passages:—"That no corrupt practice was proved to have been committed by or with the knowledge or consent of any of the candidates at the said election," and "that it was proved to the satisfaction of the learned judge that neither the said Sir Henry Stracey nor the other candidates at the said election had any personal knowledge of or connection with bribery or corrupt practices." After reporting that corrupt practices did prevail extensively at the election, he in a special report stated their nature, and concluded: "The case of general bribery, therefore, arose only incidentally; if it be deemed right to have this matter further investigated it can only be done under the provisions of the 15 & 16 Vict. c. 57. The claim to the seat by Mr. Tillett was abandoned for reasons perfectly satisfactory to me, and I believe the election on his part to have been perfectly pure."

After this a Royal Commission, issued under the provisions of 15 & 16 Vict. c. 57, to inquire into corrupt practices at Norwich, who made their report in February, 1870.

On the 12th of July, 1870, a fresh election was held, at which Tillett and Huddleston were candidates, and Tillett was returned. The present petition was then presented against his return and claiming the seat for Huddleston; and the 5th and 6th clauses contained general allegations of bribery and treating by the respondent and his agents at the election in 1868, which it was admitted might have been inquired into under the recriminatory charge at the former trial. The matters intended to be relied on, however, were not known to the petitioner at the time of the hearing of the previous petition, but were discovered at the proceedings before the Royal Commission. On an application at chambers, Byles, J., made an order to strike out these clauses on the ground that the matters contained in them could not now be gone into, with liberty to apply to the Court. This rule was accordingly obtained to rescind that order.

Manisty, Q.C., and *Rodwell, Q.C.*, shewed cause. The principle

of all the Acts relating to parliamentary elections has been, that the time should be limited within which questions affecting them should be raised; such a limit is to be found in the case of the offences of bribery, treating, &c., 17 & 18 Vict. c. 102, s. 14; 26 & 27 Vict. c. 29, s. 5; and so also petitions against the return of a member must, by 31 & 32 Vict. c. 125, s. 6, subs. 2, be presented within twenty-one days; yet now it is proposed to go into matters which occurred at a former election, and which would have formed an appropriate matter for a petition at the time if the respondent had been returned.

[WILLES, J. At the trial of the election petition at Westbury, I held that the fact of the sitting member having been guilty of bribery at the preceding election could be gone into, and he was unseated on that ground.]

There the question at issue had not been previously decided, but here, the question has been already decided on the former petition, and cannot therefore be reopened. The recriminatory case always precedes the scrutiny: *Lyme Regis Case* (1); *County of York, West Riding, Southern Division Case* (2); and it was not till the recriminatory case had been gone into and had failed, that the present respondent consented to abandon the scrutiny. If the scrutiny had been gone into, and Tillett had been seated, could he at a fresh election have been charged with bribery? If the recriminatory charge had been proved and he had been reported guilty of personal bribery, the penalty provided by the Act would have followed; is he to be liable to be tried again because he was found to be innocent? In the *Taunton Case, Waygood* v. *James* (3) it was correctly stated that the Law does not allow matter which might have been brought forward at one trial, and is not, to be made the subject of a fresh proceeding, and this was laid down also by the Speaker, Mr. Manners Sutton, in the *Southampton Case*, referred to in Rogers on Elections. (4) The decisions on elections petitions are analogous to judgments in rem, and are binding in all proceedings, though the petitioners may be different.

In the absence of any distinct provision on the subject, the

(1) 1 Pow. R. & D. 25.
(2) 1 O. Mal. & Hard. 213.
(3) Law Rep. 4 C. P. 361.
(4) 10 Ed. 461, note m.

1870

STEVENS v. TILLETT.

Court will be guided by the practice of the Election Committees of the House of Commons, as is directed by s. 26 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125). Those committees always treated a person who had petitioned for a seat, and so laid himself open to recriminating charges, in the same light as a person who had been returned and petitioned against. Thus in the *Carnarvon Case* (1) a special resolution was passed authorizing the petition to be heard, which shews that such petition would not have been otherwise admissible. The *Great Yarmouth Case* (2), and the *Dublin Case* there cited, are to the same effect.

[BOVILL, C.J. In all those cases the person petitioned against had been seated on the former petition.]

Yes; but Clifford's *Southwark Case* gives at the end, pp. 353, 357, two *Canterbury Cases*, which are precisely in point. There though the persons petitioned against had not been seated on the former petition, the second petition was disallowed. In that case there were four candidates at the first election, and a petition having been presented against the two who were returned, claiming the seats for the other two, it was shewn that they were all four guilty of bribery. A new election being held, the same candidates stood, and the same two members were returned; a petition was again presented against the two members who were returned, claiming the seat for the other two candidates, and the committee would not allow recriminatory charges to be gone into, alleging the bribery on the former occasion. The books of practice lay down that matter which might have been introduced into a former trial, cannot be made the subject of a fresh petition, Warren 485–487. The petitioner will rely on the second *Cheltenham Case* (3); but there the seat was abandoned on the first petition before the recriminatory charges had at all been gone into. In the second *Clare County Case* (4), the conclusion of the committee on the first petition was that bribery was not proved, and this was not reported to the House; on the second petition the question was raised whether the matters relating to the former election could be gone into, and the committee appear to have investigated them provisionally, and

(1) Per. & Kn. 106; Cock & R. 127.

(2) Falc. & Fitz. 663–665.

(3) 1 Pow. R. & D. 224–226.

(4) Wolf & Br. 191.

found that no bribery could be proved, and the point therefore was not decided.

1870

STEVENS v. TILLETT.

O'Malley, Q.C., Sir *J. Karslake, Q.C.*, and *Griffits*, in support of the rule:—The question may be considered as if these two clauses were the only ones in the petition, and the question was, whether the petition could be presented or not? The object of past legislation has not been to put a limit in all cases to all proceedings arising out of elections, but to get the composition of the House formed as finally and as soon as possible. It is upon that principle that a distinction is drawn in the Parliamentary Elections Act, 1868, between cases in which a determination shall be final and those in which it shall not. With respect to the question who shall occupy the seat, the decision on an election petition is a decision in rem, and binding upon all persons; but this is not the case with questions which affect only candidates and petitioners. The whole of the proceedings till the seat is filled form but one election, and until that takes place the matter has not been fully decided, and no one can be declared to be acquitted. That the whole forms one election has been clearly decided: second *Southwark Case* (1); *Newcastle-under-Lyne Case* (2); second *Peterborough Case* (3); *Dungarvon Case.* (4) The Parliamentary Election Act, 1868 (31 & 32 Vict. c. 125), s. 5, gives a right to petition against a member on certain conditions being fulfilled; and the subsequent sections provide that the petitions shall be heard, and the Court would have no power to make a rule which should take away that right, nor if the practice of the committees would have that effect, would this Court be authorized to follow it. The Act itself contains nothing to prevent these matters forming the subject of a petition. The 11th section, subs. 13, expressly declares that the certificate of the election judge shall be final, and thereby strongly implies that the report of the judge with respect to which there is no such provision is not final. There are some cases in which the report cannot be final; thus, if there be an allegation that the candidate has been guilty of corrupt practices the judge must report thereon (s. 11, subs. 14 (a)), whether the seat is claimed for the candidate, and a recriminatory case gone into or not; yet it could not be contended that the candidate could not afterwards be pro-

(1) Clifford, 131.
(2) Bar. & Aust. 564.
(3) 2 Pow. R. & D. 287.
(4) 2 Pow. R. & D. 300.

1870

STEVENS v. TILLETT.

secuted for corrupt practices, if the judge reported that they had not been proved. But further the report of the judge is only as to the question of personal bribery; and that is all that is really referred to by Martin, B., in this case, and cannot therefore affect the question of the corrupt practices of agents which would yet be sufficient to render the respondent incapable of holding his seat. Nor can it make any difference whether the question could have been raised in the former proceedings or not; those proceedings are in no sense proceedings in rem, except in relation to persons who are declared to be entitled, or not to be entitled, to the seat; and that being so, on what ground is it to be said that a decision come to between A. and B. is to be binding on C.? There may have been collusion in the former case or many reasons why the charges were not pressed. It may be that a judge would not allow the same charges that were actually gone into on the former occasion to be reopened; but it cannot be decided on affidavits at this stage what those charges were, the question should be left to be decided when the petition is heard. In the present case the matters which will be brought forward are entirely fresh, and were not even known at the time of the former petition.

These views are in direct accordance with the practice of the parliamentary election committees when properly examined. The dictum of the Speaker, Mr. Manners Sutton, with respect to the Southampton election is the only authority to the contrary, and a search of the parliamentary records shews that no petition was ever, in fact, presented; and it amounts, therefore, merely to a general statement by the Speaker, that when a committee has pronounced upon the merits in any case the question cannot be reopened. That was, in fact, similar to the *Taunton Case, Waygood* v. *James* (1). In the *Canterbury Cases* (2), on the first petition it does not seem to have been disputed that the committee were concluded by the decision of the former committee which unseated those same men for bribery, and whose decision was final by the Grenville Act (10 Geo. 3, c. 16); and the only question seems to have been, whether notice of their disqualification had been given to the electors. The committee did not, therefore, go into the recriminatory case on that petition, there being a second petition, which was

(1) Law Rep. 4 C. P. 361. (2) Clifford's *Southwark Case*, 353, 357.

a cross petition against the other two candidates. This second petition was, after a long argument, rejected on the ground that the conduct of the petitioners was so fraudulent as to disentitle them to be heard. The whole of this discussion would have been unnecessary if the allegations of the petition could not be heard because they had been gone into on a former occasion; and it further appears that the house allowed fourteen days for a fresh petition to be presented, and such a petition was presented, but fell to the ground because the recognizances were not completed. The case, therefore, is a distinct authority for the petitioner. There are other cases in which on the second election the question of bribery at the first has been gone into, though it might have been raised on a former petition; such are the *Camelford Case* (1), the second *Cheltenham Case* (2), and the second *Clare Case* (3). The two last of these are of the more weight as being recent cases, since election committees were smaller, and the chairmen chosen from a special list; they were presided over respectively by Sir Roundell Palmer and the present Mr. Justice Mellor. On every ground, therefore, both of principle and authority, the petitioner is entitled to rely on the matters alleged in these two clauses of his petition.

BOVILL, C.J. In this case an order was made by my Brother Byles, at the instance of the respondent, to strike out the fifth and sixth clauses of the petition which had been presented against the return of Mr. Tillett as member for Norwich. At the time the matter was before my learned Brother at chambers, several authorities were cited which it was supposed would sanction the course that was adopted; and he therefore made the order, but desired that the matter should be brought before the full Court. His object in doing so was to save expense to the parties, if the Court should be of opinion that the matter in question could not again be inquired into; and it is manifest that very unnecessary expense would have been incurred in taking the case down to trial, if the Court ultimately decided that the matter was one which could not be gone into.

(1) Corb. & D. 239. (2) 1 Pow. R. & D. 224.
(3) Wolf & B. 191.

1870

STEVENS v. TILLETT.

The question has now been brought before the Court; and it is a matter of very considerable importance, affecting the privileges and rights not only of members of parliament, but of candidates and expectant members of parliament.

It was contended on behalf of the respondent that the certificate which was given by Martin, B., on the trial of the former petition, was conclusive, and prevented the present petitioner from going into matters which might have been inquired into on that petition. On the former occasion, Mr. Tillett, being the petitioner, succeeded in unseating his opponent; and there is no doubt that it was perfectly competent, on the petition which Mr. Tillett then presented, for the sitting member to have gone into a recriminatory case against Mr. Tillett, and in point of fact he did so, so far as three matters were concerned. The evidence, however, failed; and then the sitting member abandoned the case as against Mr. Tillett. Mr. Tillett also abandoned his claim to the seat; and my Brother Martin, upon that state of things, made his report. Having decided that the sitting member, Sir Henry Stracey, was not duly elected, and that his election was void, the learned Baron certified such his determination to the Speaker. The certificate which was sent to the Speaker contained a further report in these terms: "That no corrupt practice was proved to have been committed by or with the knowledge or consent of any of the candidates at the said election;" and, further, "that it was proved to the satisfaction of the learned judge that neither the said Sir Henry Stracey nor the other candidates at the said election had any personal knowledge of or connection with bribery or corrupt practice." Then, after reporting the names of persons who had been guilty of corrupt practices, he proceeded to report that corrupt practices did prevail at the said election, and that there was reason to believe that corrupt practices did extensively prevail at the same, and that they were of the nature stated in his special report which followed. The special circumstances were then stated, which it is unnecessary to refer to for the present purpose: and the certificate or report concluded as follows:— "The case of general bribery, therefore, arose only incidentally. If it be deemed right to have this matter further investigated, it can only be done under the provisions of the 15 & 16 Vict. c. 57.

The claim to the seat by Mr. Tillett was abandoned for reasons satisfactory to me; and I believe the election on his part to have been perfectly pure." Those are the material parts of the certificate and report which were made by my Brother Martin.

After the second election, which is now in question, Mr. Tillett having been elected, the present petition was presented; and the fifth and sixth paragraphs (the sixth being founded on the fifth) contained certain charges against Mr. Tillett, in general terms, of bribery at the previous election; and there is no doubt that those are matters which might have been inquired into as against him on the hearing of the former petition. Some of those matters were inquired into, viz. the three cases before mentioned: but the matters intended to be relied on in the present petition were not gone into; they were not even known to the present petitioner, as far as appears from the affidavits, and certainly there was no decision on them. They were never brought to the attention of my Brother Martin at the hearing of that petition; and the facts on which the petitioner now relies were subsequently discovered on the execution of the Royal Commission to inquire into corrupt practices at Norwich.

It is contended that the petitioner in this case is estopped and concluded from setting up such a case, though it was not known at the time of the trial of the former petition, nor inquired into by my Brother Martin. That is the state of things under which the present question is brought before us for consideration.

The jurisdiction of this Court, as regards the trial of election petitions, depends entirely upon the Parliamentary Elections Act, 1868; and the decisions of the election judges must be governed by the provisions of that statute. In considering what is the true construction to be placed upon that Act of Parliament, and the different enactments which it contains, it seems to me to be very material to look to the course of legislation upon this subject, and to see what were the provisions of former Acts in lieu of which the present enactments have been passed.

Going back to the Grenville Act (10 Geo. 3, c. 16), there are two sections in that Act which seem to me to be important with reference to the present question, viz. the 18th and the 25th. Those sections draw a marked distinction between a matter which

1870

STEVENS v. TILLETT.

is to be *determined* by an election committee, and a matter upon which an election committee may *report*. The 18th section enacts that "the select committee shall" (leaving out the intermediate words) "determine whether the petitioners or the sitting members or either of them be duly returned or elected, or whether the election be void; which determination shall be final between the parties to all intents and purposes;" that is to say, upon the question which was to be determined of who was to be returned or elected, or whether the election was void, the Act says that the determination is to be final as between the parties, to all intents and purposes. So far the select committee would have had no power conferred upon them by that Act to determine or even to report upon any other matter. But by the 25th section it is enacted "that if the select committee shall come to any resolution other than the determination above mentioned, they shall, if they think proper, report the same to the House for their opinion, at the same time that the chairman of the said select committee shall inform the House of such determination, and the House may confirm or disagree with such resolution, and make such orders thereon as to them shall seem proper."

The matter to be determined under the 18th section was, the validity of the election, and who was to be the sitting member, or whether the election was void; but, by the 25th section, the committee had a further discretionary power, if they thought fit, to come to a resolution on any other matter, and to report that to the House, whereupon the matter would be considered by the House, and they would make such orders on the matter as to them should seem right. It is clear, therefore, under that Act, though a "determination" was by the express terms of the Act to be final, yet a "report" on other matters was not only not declared to be final, but the committee were not even bound to report upon them; and, when they had reported upon them, it was not the resolution of the committee that was to have any force or effect, but it depended upon what action the House of Commons thought fit to take in the matter. Therefore, at the commencement of this legislation, a manifest distinction is made between a "determination" of the petition and a "report" upon other matters.

Following the course of legislation, we then come to the Act of

1848, 11 & 12 Vict. c. 98, the Election Petitions Act; and we find there two sections, the 86th and 87th, corresponding very much with the sections of the previous Act. The 86th section enacts "that every select committee shall try the merits of the return or election complained of in the election petition referred to them, and shall determine whether the sitting members or either of them, or any and what other person, were duly returned or elected, or whether the election be void, or whether a new writ ought to issue, which determination shall be final between the parties to all intents and purposes; and the House, on being informed thereof by the committee, shall order such report to be entered in their journals, and shall give the necessary directions for confirming or altering the return, or for ordering a return to be made, or for issuing a writ for a new election, or for carrying the said determination into execution, as the case may require." That is as regards the matter to be "determined." Then, the 87th section, which deals with the "reporting" of other matters, enacts, "that, if any such select committee come to any resolution other than the determination above mentioned, they shall, if they think proper, report the same to the House for their opinion at the same time that they inform the House of such determination; and the House may confirm or disagree with such resolution, and make such orders thereon as to them seems proper."

In that Act of Parliament, again, a manifest distinction is drawn between a "determination" of the matters which are to be determined by the select committee, and a "report" which they may or may not make on matters which they may or may not report upon, and which report the House may or may not agree to or think fit to give directions upon.

If the matter had rested there, no further effect would be given to a report; and it is only by subsequent legislation that a greater effect was given in some instances to the report of an election committee. One of the earliest enactments upon that subject after the passing of the Act to which I have just referred, is contained in the 15 & 16 Vict. c. 57, s. 1, which provided that, where a committee appointed to inquire into corrupt practices had reported to the House that corrupt practices had, or that there was reason to believe that corrupt practices had extensively prevailed,

1870

STEVENS v. TILLETT.

then, upon an address of both Houses of Parliament, a royal commission might be issued. Therefore, effect was given to such a report, as the foundation of a commission; but it was not considered, nor was it declared to be in any sense conclusive or binding on anybody.

Two years afterwards, by the 17 & 18 Vict. c. 102, s. 36, the Corrupt Practices Prevention Act, 1854, much greater effect was given to the "report" of a committee, because by that section it is enacted, that "if any candidate at an election for any county, city, or borough, shall be declared by any election committee guilty by himself or his agents of bribery, treating or undue influence at such election, such candidate shall be incapable of being elected or sitting in parliament for such county, city, or borough during the Parliament then in existence." Therefore, by that Act, a very important effect was given to the "report" of an election committee, so far as any candidate was concerned; for, if he was found guilty, he was declared to be incapable of sitting during the existing parliament.

Then, by another Act, the 26 Vict. c. 29, s. 9, further effect was given to a report of an election committee, where they reported that individuals had been guilty of corrupt practices; but even then it was not declared to be final, and the report would have to be laid before the Attorney-General with a view to the prosecution of the persons named in the report.

I think that is the position in which legislation on this subject stood with regard to election committees and their decisions, and the effect of them, at the time of the passing of the Parliamentary Elections Act, 1868. In its general scope (subject to some alterations), what had been the usual course on the trial of election petitions, and the effect of the decisions of election committees, has been preserved by the late Act. The tribunal is altered, and there are more stringent provisions in some respects; but the legislation is very much in harmony with what had gone before.

Now, this Act of Parliament, which is really the foundation of our jurisdiction, and which declares and must determine what is the effect of reports of the election judges, makes a very material distinction between what is final and what is not final. For instance, subs. 13, of s. 11, declares that the determination of the

election judge shall be final to all intents and purposes. But that is the "determination" mentioned in that section, viz., as to who was duly returned or elected, or whether the election was void, that is, by the express terms of the clause, which says, that "at the conclusion of the trial, the judge who tried the petition shall determine whether the member whose return or election is complained of, or any and what other person, was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker; and upon such certificate being given, such determination shall be final to all intents and purposes." The other case in which a decision is to be final is, under subs. 16 of the same section, which enacts that a special case may be stated under certain circumstances, which shall be heard before the Court, and that "the decision of the Court shall be final; and the Court shall certify to the Speaker its determination in reference to such special case." In those two cases, both of which relate to the determination of the question as to who is to be the sitting member, or whether the election was void, the Act expressly declares that the determination shall be final. That is entirely in accordance with the Grenville Act, and with the 11 & 12 Vict. c. 98. The provisions are almost in words the same.

Then, following the provisions of the previous Acts (it having been optional, however, under those Acts with the election committees to report on any special matter as they might think fit), subs. 14, of s. 11 of this Act says, "the judge shall, in addition to such certificate, and at the same time, report in writing to the Speaker." It nowhere says that such report is to be final. It does not say that the judge shall determine any particular matter, or that he shall not determine any particular matter, in terms; but it says, he shall report, first, "whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice:" Then secondly, "the names of all persons (if any) who have been proved at the trial to have been guilty of any corrupt practice: Thirdly, "whether corrupt practices have, or whether there is reason to believe that corrupt practices have, extensively prevailed at the election to which the petition

1870

STEVENS v. TILLETT.

relates." And, at the same time, he is authorized to make a special report to the Speaker as to "any matter arising in the course of the trial, an account of which in his judgment ought to be submitted to the House of Commons." There, again, with the exception that it is obligatory on the judge to make a report, almost the same language is used as to the judge making a report as was used in the former Acts with regard to the report of the election committee, although the consequences which are to follow are not mentioned in that section. We have to look to other sections to see whether consequences similar to those which were enacted in the previous statutes are to follow upon that report.

By one of the former statutes, 15 & 16 Vict. c. 57, a report of a committee might be the foundation for a royal commission; and effect is given to the report of a judge expressly by the 15th section of this Act of Parliament precisely in the same manner. So, with respect to the disqualification of candidates, effect is given to the report by two other sections of this Act, viz., by the 46th, which gives the same effect to the report of an election judge as was given to the report of an election committee in cases where there was no personal bribery established; and, secondly, by s. 43, similar effect is given to the report in cases where personal bribery is established, but with additional punishments. There are also exceptional sections introduced here, imposing additional penalties.

My object in referring to the previous legislation was, to shew how closely the provisions of the former Acts have been followed in the recent Act of Parliament; and, just as a distinction is made in those Acts between the "determination" of the petition and a "report" upon other matters, so this Act of Parliament, while it says that the "*determination*" of the petition is to be final, contains no such words as to the "*report.*" Where effect is intended to be given to the report, it is expressly enacted what that effect shall be; but there is nothing in this Act which I have been able to discover that makes the mere "*report*" of the election judge equivalent to his "*determination.*" There is nothing which says that the report is to be final for any purpose whatever, except in the particular cases that are expressly mentioned; and the present is not one of them. If parliament had intended, not only that the determination of the question as to the seat was to be final, but

that the report was to be final in other respects, it would have so enacted. But it could hardly have been intended that such a report should be final, looking at the various matters which may be included in it, as stated in the different paragraphs of s. 11. If the report was not to be final under the old Acts, it seems to me that we should be going a long way, and straining the construction of this Act, to hold that it was to be final in this case, or that the parties were concluded by it.

It is said that, where there is no provision in this Act, and where no rules of Court have been made, we are governed by the practice and principles upon which committees of the House of Commons acted. And, undoubtedly, if there had been any clear and settled practice of committees of the House of Commons, or of the House of Commons itself, I should have been disposed to pay proper attention to such practice; and, if it had been quite clear, then it is possible that the case might have been brought within the 26th section of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125). But, so far from there having been any such settled practice of committees of the House of Commons as was attempted to be set up by the respondent, the practice, as far as I can collect it, seems to have been exactly the contrary.

It is true that, as regards members who are returned to parliament in the first instance, or who are seated on petition and therefore are de facto members of the House of Commons, the House has from time to time taken means to require that all questions affecting the validity of the seat shall be tested within a certain time and under certain conditions, and that, after a particular time, under given circumstances, there shall be no further investigation as to the title to the seat. For instance, the time for presenting petitions has always been limited by resolutions of the House of Commons, or by general orders; and there was, again, a further limitation in many cases, by resolutions of committees, as to what could or could not be gone into. So, by this Act, the time within which a petition is to be presented is limited: and then, the matter being one as to the status of the member, it is declared that, if the matter has been determined by the election judge, that shall be final to all intents and purposes. That has been the scheme of legislation; and there is good reason why, in the case of the sitting

1870

STEVENS v. TILLETT.

member, there should be a final determination, and why he should not be indefinitely harassed, and also why the House of Commons or the electors should not be left in uncertainty as to who is the real representative. And the legislature, with a view, as it seems to me, to settle that question, specifies a time beyond which no further question should be raised as to the right of the member to the seat; the House of Commons always, of course, reserving its jurisdiction over its own members. In nearly every one of the cases that have been referred to where the parties were precluded absolutely, it was the case of a man who either was a member or was seated on petition; and in those cases the election committees held that, the recriminatory case having been gone into on the former petition, or there having been the power of going into it on the former petition, the matter could not be inquired into again. And why? Because it had been declared by parliament, and in accordance with the Acts of Parliament decided by committees, that the thing was concluded. Upon that principle it was that, when we were called on in this court to decide, in the case of the Taunton Election (1), whether matter which could have been gone into on a former petition, and was not so gone into, could be raised on a subsequent petition against the sitting member who had been seated on the first petition, we came to the conclusion,—looking to the former Acts of Parliament, which declared that the determination of the election committee should be final, looking at this Act, which declares the determination of the election judge to be final, and looking to the reasons for such an enactment in the case of a sitting member,—that that determination was final, and that matter which could have been gone into on the former petition could not be again opened as against the sitting member. That depends altogether on the express enactment of the legislature, the object being, I have very little doubt, that which I have stated, and which was put forward in the argument very clearly by Mr. O'Malley.

But, with regard to the person who is the candidate, or who is the petitioner, the same rule does not apply; and parliament has not cared to provide for finality as regards a person in that position. No case has been cited which satisfies my mind that it ever was the practice of committees of the House of Commons to refuse to

(1) *Waygood* v. *James*, Law Rep. 4 C. P. 361.

enter into matters connected with the former election which was voided, and in a parliamentary sense connected with the election under discussion, as against a person who had not been declared the sitting member by a previous committee.

Several cases were referred to by Mr. Rodwell, the one on which he principally relied being the second *Canterbury Case*. (1) But really, if the decision in that case were to the effect Mr. Rodwell contended for, it would be so monstrous that it could not stand for a moment. To suppose that, when a man had had bribery actually proved against him on the former case, that could not be brought forward on the subsequent petition, is so absurd on the face of it that I could not suppose the committee came to any such resolution. The truth is, that nothing of the sort occurred. The explanation of the case seems to be that, on the petition with respect to the second election, those who had been candidates were considered to be entitled to be seated; and then the question was considered, as to whether a recriminatory case could be gone into against them. But the persons who were unseated had no locus standi because they had been declared guilty of bribery; and the question could then only be raised upon a cross petition: and, if Mr. Rodwell was right in his contention, of course the committee would only have had to say, "We reject the cross petition, and will not go into it, because the matter has been already inquired into." But, instead of saying so, they went into a long inquiry whether the cross petition was fraudulent or not; and, upon that petition being held to be fraudulent, they said they would not entertain it. That seems to be the result of that case; and, so far from its being any decision that a matter involved in a former inquiry will not be inquired into, it seems to shew that, where there is a proper petition, and by persons in a condition to be heard, the committee would go into the case, though it is a recriminatory case, which might have been gone into by the respondent on the former petition. That was the principal case relied on by Mr. Rodwell. But, when we look at the other cases to which our attention was drawn by Mr. O'Malley, in the course of his able argument,—the second *Cheltenham Case* (2), the second *Clare Case* (3), and the

(1) Clifford's *Southwark Case*, 357.

(2) 1 Pow. R. & D. 224.

(3) Wolf. & Br. 191.

1870

STEVENS v. TILLETT.

Camelford Case (1), and at the observations which were made by the learned and distinguished judge, Sir Joseph Napier, in the *Dungarvon Case* (2),—and after the careful research which both parties appear to have made, there is not a doubt in my mind that there is no authority to be found in support of the proposition that election committees would not have allowed such a matter as the present to be gone into in a case like the present; especially matter which had never been inquired into before. There is no authority approaching to it. Very early in the argument I asked whether such a case was to be found; and no decision satisfactory to my mind has been produced upon the point in favour of the respondent. I may also remark that, in one of the cases cited for the appellant, and a very important case it was, one of the most distinguished lawyers of our day, Sir Roundell Palmer, was a member of the committee, and therefore the case is entitled to the greater weight.

On the hearing of the former petition in this instance, three cases of recrimination were gone into, and whether those cases could now be re-opened it is not necessary to decide; because the point here raised is as to a case which was not gone into on the former petition. It seems to me that there is no authority for saying that, as to such a case, an election committee would have held that the petitioner in this case was precluded from going into it because the matter might have been gone into on some former occasion. I think that there is nothing in this Act, or in the former Acts, which at all concludes or estops the petitioner from going into that case on this petition; and that there is nothing, on general principles, which ought to preclude the petitioner from now relying upon it. If that be so, then there is no authority for striking the two paragraphs in question out of this petition.

It has been contended that this matter ought to be treated as res judicata altogether, and that there is an end of it. But, how can it be said that there has been any adjudication by my Brother Martin upon a matter not even known, never brought before him, and between different parties, and there being no legislative enactment that other persons shall be concluded by the previous inquiry.

(1) Corb. & D. 239. (2) 2 Pow. R. & D. 300.

If there had been any such enactment, of course it would have been our duty to give effect to it.

It was contended that this is something in the nature of a decision in rem, or, rather, it should be said, as to the "status personæ." With regard to the sitting member, the determination is a determination necessarily as to his status; and parliament has declared that that shall be final: but, with regard to a mere candidate or petitioner, there is no such enactment. There is no decision as to *his* status. The judge simply finds that the matter is not proved against him. Therefore, I am at a loss to see how, so far as he is concerned, anything which it is now proposed to go into can be considered in the nature of matter which has been already adjudicated upon.

If a candidate is found guilty of bribery, having had the opportunity of being heard, no doubt effect is given, but expressly given by statute, to the report of the judge; but there is no such enactment nor any effect given to the case where a judge simply says by his report that it is not proved. If the case is declared not to be proved, it leaves the matter entirely open either for prosecution or to be dealt with in any other way, and no effect is given to the report in that form. The Act of Parliament certainly does not make such a report of the learned judge conclusive; and it seems to me that we have no power to make it so, or to declare that the petitioner is estopped. It is true that in this case the report of my Brother Martin, besides saying that nothing was proved, goes on to say,—"And I believe the election was on the part of Mr. Tillett perfectly pure." If nothing was proved to the judge's satisfaction, and especially if this matter proposed to be relied on was not brought forward, the judge might properly say, I believe so and so. How could he believe anything else on the evidence before him? That statement of belief is certainly not a matter declared to be final and conclusive; nor is it anything more than the belief of the judge on the facts then before him: and, if there is no decision on the matter which is now sought to be inquired into, his belief on the subject has no effect. There is no determination by him upon the point, but simply a report upon what was before him.

I am of opinion that there is nothing in the Act, or upon

1870

STEVENS v. TILLETT.

general principles, to prevent the matter being inquired into; and in my judgment, therefore, the fifth and sixth clauses of the petition must be restored.

WILLES, J. I am of the same opinion. In dealing with this or any other case brought before us under the Parliamentary Elections Act, 1868, we must not forget, in respect of proceedings under that Act which are now confided to this Court, although the jurisdiction is new, we are not to invent new principles or new procedure for the purpose of administering that jurisdiction; but we are, in the terms of the 2nd section of the Act, to remember that we have the same power, jurisdiction, and authority with respect to an election petition and the proceedings thereon as we should have if such petition were an ordinary cause within our jurisdiction. Whatever discretion, therefore, we exercise under this Act must be a discretion regulated according to law, following the analogy of proceedings in ordinary causes within our competence.

Now, I apprehend that, whilst the practice of the Court is not to compel parties to plead in a cause which has been instituted against good faith, or which as manifestly appears to the Court cannot be prosecuted further to any separate conclusion,—a jurisdiction which we exercised in the *Taunton Case* (1), because expressly according to the 11th subs. of s. 13, the validity of Mr. James's return had been decided by a determination which the Act declared should be final to all intents and purposes, and which therefore it was not competent for any one under any other circumstances to question,—on the other hand, we ought not to stay or to hamper, whether by such an order as was made in the *Taunton Case* (1), or by such an order as was made in the present case, the proceedings at the trial in the ordinary course, in open Court, and in the presence of the shorthand writer who is appointed to report the proceedings to the House of Commons under s. 24 of this Act, unless such a case as that which I have described is made out, and unless it is obvious that at the trial no case can be raised on the part of the petitioner which would make it the duty of the judge to grant the prayer of the petition. The order in this case, to strike out the clauses in the petition which were objected to

(1) *Waygood* v. *James*, Law Rep. 4 C. P. 361.

must therefore be sustained, if it be sustained, upon shewing that leaving those clauses in the petition could not have any effectual end in the disposal of the prayer thereof, whatever might be the character of the evidence which was produced before the judge at the trial.

The true question, as it appears to me, upon this occasion is, whether in any reasonably conceivable state of the evidence a case might be made out upon the trial of this petition before the judge in the regular and ordinary way prescribed by s. 11, subs. 1, which would make it the duty of the judge to grant the prayer of the petition; and I conceive such a case may upon the trial of this petition be made out.

The argument in support of expunging the fifth and sixth clauses of the petition is founded, and must be sustained, upon the construction and effect of s. 53 of the Act operating upon s. 11, subs. 14, div. (a). The 53rd section of the Act is that which enables the member petitioned against, where the petitioner claims the seat, to recriminate upon the petitioner or person for whom he claims. With respect to that section, I content myself with observing that there is no duty imposed upon the member under such circumstances to recriminate. He may recriminate, or he may not. If he does not, the judge, looking to the rule which requires particulars of the recrimination to be given (1), has no power to inquire into the matter at the trial, unless something should crop up incidentally which would make it the duty of the judge, if such a case could be conceived, to call witnesses, under s. 32, which enables the judge to take that course in cases in which he thinks it right to do so,—a contingency so remote that it has not been referred to in the argument, and I think properly has not been referred to. The question whether the petitioner is disqualified may or may not come before the judge. If recrimination takes place, and the question does come before the judge, then, in respect of the cases which are presented for the judge's consideration, it is the duty of the judge to adjudicate: but it is the duty of the judge to adjudicate only sub modo: he does not adjudicate exhaustively whether the petitioner has been guilty of corrupt practices either by himself or by his agents, so as to satisfy s. 36

(1) Rule 8, *Regulæ Generales*, Mich. 1868, Law Rep. 4 C. P. 773.

1870

STEVENS v. TILLETT.

of 17 & 18 Vict. c. 102, to which I must presently refer; but it becomes his duty to decide whether the candidate is or is not guilty of personal corruption,—whether, under div. (a) of subs. 14 of s. 11, it "has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election, and, if so, the nature of the corrupt practice." If a case is presented to the judge, and the judge does decide thereupon that it has been proved that the candidate was guilty of any corrupt practice, the result is that the candidate is liable to certain penalties. And here I apprehend that the hardship is rather upon the judge than upon the candidate; because I cannot imagine to myself a jurisdiction more painful or more responsible than that of deciding, without the assistance of a jury, that the candidate has been personally guilty of so grievous an offence. If the judge feels himself compelled, with all the qualms that must operate upon the mind of a judge not assisted by a jury, in pronouncing alone and without appeal, in a criminal case, so to decide, then and not till then applies the 43rd section; and the candidate is subject to the grievous disabilities imposed by that section in respect of future status both parliamentary and otherwise. That, however, is a special provision, not applicable to corruption at the election, nor applicable to treating nor to intimidation, but limited to bribery alone. Not only, as my Lord has observed, is that an exceptional section, in respect of the penalties following upon a conviction by the voice of a single judge without a jury; but it is an exceptional section in that it involves penal consequences, not in respect of all and each of the various offences of which a candidate may be pronounced guilty under div. (a) of subs. 14, but only in the particular case of bribery.

This construction of the Act of Parliament appears to me clearly to eliminate s. 43 from those sections which throw light upon the general intention of the legislature in the procedure which has to be taken before the judge: this being a special stigma affixed upon a particular offence, and upon that only, and only in an extreme and peculiar case. And, to say that hardship may accrue to persons who are personally guilty of bribery, and are proved to be personally guilty of bribery to the satisfaction of a judge, with all the sense of responsibility which he must feel under the circum-

stances in which he is called upon to arrive at such a decision, certainly does not move my pity. If a person has been found guilty of personal bribery under circumstances of that description, however one may lament the circumstance of a jurisdiction of this kind being given to a single judge, one certainly can have no sympathy or concern for a man who falls under the special reprobation and punishment which parliament in its wisdom has thought proper to impose in that case. That is the only observation I have to make upon s. 43. I reject it as throwing any light upon the true construction of s. 53 and the directions in s. 11 as to the ordinary proceedings before the judge.

I return to s. 11, and consider the duty of the judge in coming to his conclusion under div. (a) of subs. 14. Unquestionably it must be admitted, and it was not denied, as I understood, for a moment, by Mr. O'Malley or Sir John Karslake, that practically, and for practical purposes, all the cases brought before my Brother Martin at the former petition, and disposed of by him, were disposed of finally and for ever. But I go further, because in my opinion, not only practically, but in point of law, and according to the true principles applicable to judicial decisions, and to the effect of a thing once decided by a competent tribunal, all such charges were disposed of once and for ever as a matter of law, and not as a matter of discretion merely. I say so for this reason, because it was the duty of the judge, if the respondent elected under s. 53 to recriminate, when he brought forward a case coming within the particulars in support of the charge of recrimination, to dispose of that case; and it was his duty to report upon the effect of that case. That being his duty, he had to decide whether the case was or was not established, and, if no case brought forward was established, he was bound to report that so far corruption was not established under div. (a). And, for that purpose, it appears to me that it was intended by the legislature that the decision of the judge should be a final decision. I think that is one of those cases in which, when a matter has once been brought before a competent tribunal, and decided by that tribunal, it is considered that, inasmuch as litigants are mortal, it would be inconsistent with good sense and with the principle according to which litigation once concluded is to be considered as concluded once for all unless

1870

STEVENS v. TILLETT.

there is an appeal, to say that there should be an inquiry into the same matter again: and in this statute no appeal is given from the judge.

As was pointed out by the Lord Chief Justice, in the case of the report of a committee either under the Grenville Act (10 Geo. 3, c. 16), or the Election Committees Act of 1848 (11 & 12 Vict. c. 98), of any resolution other than the determination of the election, the House might "confirm or disagree with such resolution," and decide whether it should be acted on or not. The House has no such power given to it by this statute. This Court is substituted for the House by s. 2 of the Act; and to this Court there is no appeal against the decision of the judge. The result is, therefore, as it appears to me that, for all purposes connected with elections, when the judge has once had the case brought before him, and disposed of that case, the case ought to be considered as dead and buried for all purposes connected with petitions touching that or any other election.

I am of a different opinion with respect to cases not brought before the judge, and not known, and which could not by reasonable diligence have been ascertained by the respondent at the time. Even if it were a case of private litigation, in which the interest of the respondent continued after the exigencies of the petition were disposed of, I apprehend the general well-known rule of law is, that, notwithstanding the period for the decision of a Court has gone by, there is a further period allowed, more or less extensive according to the rules by which the practice of the tribunal is governed, within which matters newly come to the knowledge of the litigant, and which he could not by reasonable diligence have discovered at the period of the first trial, may be brought forward and may be introduced by him into the litigation. That has passed, I cannot say into a proverb, but into an expression which it will be sufficient to refer to under the head of general law of which I am speaking, viz., Noviter ad notitiam perventa,—which may be introduced at a period subsequent to the inquiry at which ordinarily, and as to all evidence which might by reasonable diligence have been obtained at the time, the evidence must be brought forward or not brought forward at all.

With respect to such matters at least, it appears to me that the

report of the judge is not conclusive, whether the report of the judge be conclusive or not as to matters which might have been brought forward at the time by due diligence, it is unnecessary to express an opinion; because, if there be any class of evidence which can be introduced properly under these expunged clauses, and upon which the judge ought to pronounce at the trial, those clauses ought to be restored. With respect to that intermediate class of cases (if any) which might have been and were not brought forward, I can only say (apologizing for expressing myself in terms which may seem egotistical), if I were to try this petition I should feel the strongest reluctance to admit any matter which was within the knowledge of the respondent at the time of the first petition, or which he might reasonably have produced at the time of the first petition, and which he did not produce. But I do not feel sufficiently confident in respect of concluding that the first and second proceedings are to be treated as one proceeding,—to lay that down in point of law. If they are to be considered as a continuous proceeding between the same parties, then I should say exclude the matter, on the same ground as you exclude the matter on which the judge decided on the hearing of the former petition. But, if what is now to be brought forward is to be considered as evidence on a second proceeding of the same character as the first, and that the two proceedings are not to be considered as continuous, then still I should have a reluctance in admitting it, because I should conclude that the advisers of the respondent on the first occasion, having done their best to get up a case, had either succeeded in finding out the evidence, and thought it of no importance (which would have been a slur upon it in itself), or they had not succeeded in finding it out, and then it would have been evidence which would have been open to the suspicion of staleness, or of having been concocted after the first inquiry. But, when it was made out that matter came out under the stringency and pressure of an inquiry not within the power of the respondent on the first occasion such as we understand has taken place in this case before an election commission appointed by the Crown, then one would receive that evidence, carefully weighing it before coming to the conclusion that it was truth, and one would take it into account in determining whether or not the respondent had really been guilty

1870

STEVENS v. TILLETT.

of bribery at the former election, which he had not been convicted of or reported for by the judge, because it had not been found out and could not by reasonable diligence have been found out, upon that occasion.

I come to that conclusion also upon the terms of this div. (a), which appear to me to be carefully framed. I need not observe further upon that, because they have been very fully discussed by my Lord, in referring to the history of these "determinations," as distinguished from "reports." The sections dealing with those two matters in the Grenville Act (10 Geo. 3, c. 16), viz., ss. 18 and 25, are not only distinct sections, but there are six other sections between them. They find themselves in close company in ss. 86 and 87 of the 11 & 12 Vict. c. 98, the Election Petitions Act of 1848, and now they find themselves in one section in the 31 & 32 Vict. c. 125, upon which our decision is to turn, with only this distinction (shewing the wisdom and care with which the Grenville Act was framed), that now the judge must say what before the committee had power to say, and that the judge's decision cannot be reviewed by the Court, whereas the decision of the committee might, under the Grenville Act (as under the Act of 1848), have been reviewed by the House.

I should like to make a remark upon one matter which has been referred to in the course of the case. No doubt it had great weight in it. No doubt it operated a great deal in the proceeding for expunging the paragraphs of the petition in question. Anything coming from a judge of such experience as my Brother Martin would have great weight.

Reference was made to the expressions used by the learned judge in delivering his judgment at Norwich upon the disposal of the petition. Those expressions did not find their way into his certificate, or into his report. I do not speak of the special report. When he came to give his certificate and to make his report to the House, that certificate and that report were in the bare terms which the Act of Parliament required. At the trial, no doubt, he expressed an opinion that Mr. Tillett's election was a perfectly pure election. That is the substance of what he said. But it would be a grievous injustice to that learned judge, or to any judge, in dealing with his expressions in any case, to take them

apart from the subject-matter to which they related. My Brother Martin was dealing with a case in which upon the proof before him there was nothing, or nothing satisfactory, to bring home bribery to Mr. Tillett. He was dealing with the question whether there was any personal blame to be attached to Mr. Tillett in the transaction; and he reported accordingly, under div. (a) of subs. 14 of s. 11, that Mr. Tillett was not guilty of any personal corruption—that there was no corruption of which he was personally aware. I understand that as having been simply an expression, in handsome terms, of the result of that inquiry as it affected Mr. Tillett personally. It was not a declaration, and it could not be a declaration, that there was no evidence which could possibly be brought forward from any other source that would have affected even Mr. Tillett. Far less was it an expression of opinion that there was no such evidence which might prove that some agent of Mr. Tillett, of whose conduct he was unaware, but for whose acts he was responsible, had been guilty of the very bribery which is now charged to have taken place at the former election, and which may be proved to have taken place at the former election, quite consistently, not only with the report, but also with those expressions of my Brother Martin. I do not conceive, therefore, that we are in the least conflicting with even the spoken words of the learned judge, or any one of them, when we say that the evidence which is proposed to be offered is evidence which, if established, is relevant under the clauses of the petition which have been struck out.

I would further observe that div. (a), div. (b), and div. (c) are to be read together. If the report be conclusive for any purpose, it must be because it is a judicial decision: it must be because, as was observed by the Lord Chief Justice, it is a decision as to status. If it is a decision as to status as to (a), it is a like decision as to all the other letters of the alphabet involved in the same charge. While div. (a) deals with the charge of personal bribery against the candidate, div. (b) sweeps in any charge of bribery against any other person during the election. If the learned judge were to report that it was not proved that any person had committed bribery during that election, could it be said for a moment that that was a conclusive judicial decision that no person had

1870

STEVENS v. TILLETT.

committed bribery during that election? This shews that the expression "not proved" is an expression not amounting to "not guilty," but simply to stating that there was an absence of evidence on the subject—a statement which is equally true whether there be recrimination or not under the option given by s. 53,—whether there be proof offered or not as to the specific charge as to which the inquiry now arises. Then, when we turn to div. (c), the matter becomes still plainer. That is the division under which the judge reports, where he has reason to believe that bribery largely prevailed in the constituency. Supposing that was to be taken as a conclusive report that there was no reason to believe that it existed, would it satisfy anybody's mind as a decision that there was no corruption in the constituency, if an election commission went down, and it was proved that the constituency were steeped in bribery.

It seems to me, I own, that, whether we take the history of div. (a) of subs. 14 of s. 11 as sufficiently explained by the Lord Chief Justice—whether we take the source from which it flows, and judge of it from that, or whether we judge of it à sociis, by the other divisions in whose company we find it, upon the construction of the Act we must arrive at the conclusion that, if the judge is satisfied, there is an end of the matter; whilst, if the judge is not satisfied, and says simply "not proved," that is not an end of the matter as to cases not specifically brought before and adjudicated upon by him; because, consistently with its not being then proved, and with the principles of procedure, corruption may be subsequently proved in other cases by evidence subsequently discovered.

This is not at all inconsistent with the course of proceeding in ordinary causes. I stopped Mr. O'Malley when he was going into the question as to how far a judgment in an action is conclusive as to every claim which might have been brought forward in the action. I do not think the authorities upon that throw much light upon the subject; and I think they require to be reviewed, and I hope in proper time they will be reviewed, and some consistent conclusion arrived at upon them. But there is authority, first, that matter in respect of which no evidence was given on the former occasion may be inquired into (that is the

case of *Seddon* v. *Tutop* (1); and, secondly, that matter not known of on the former occasion may be inquired into (that is the case of *Lord Bagot* v. *Williams* (2); and there was another case, which I mentioned during Mr. O'Malley's argument, viz., *Stewart* v. *Todd*. (3) Very considerable doubt has been raised as to the extent to which those cases could be carried in the present day: but Lord Wensleydale, whose mind was deeply imbued not only with the common law but also with general jurisprudence, in the course of the argument in *Stewart* v. *Todd* (3), referred to *Lord Bagot* v. *Williams* (2) apparently with approval; and that is a case obviously consistent with the notion that facts noviter ad notitiam perventa may be introduced on a subsequent occasion, even where matter which might have been known by reasonable diligence on the former occasion could not. I do not, however, rely upon that head of law: it does not appear to me to throw any great light upon the construction of this Act of Parliament; and, as my Lord has pointed out that there are two subsections of s. 11, viz. the 13th and the 16th, which say that certain matters shall be final to all intents and purposes, there being no such provision as to the particular report in question, it appears to me that enough has been said upon that matter.

I should like, however, to say one word upon a matter which was referred to in the course of the argument; because it may be very material, not only with reference to further proceedings in this case, but also with respect to the administration of the law generally. As to matters which occurred at the former election, though bribery at the particular election goes to the disqualification of a member, yet I can find no authority at common law that bribery at a former entirely disconnected election would go to the disqualification of a member; and I think it seemed to be agreed at the Bar that there was no such authority.

When the *Dungarvon Case* (4) comes to be looked at, I think the same conclusion will be arrived at as to the then state of the law even as to bribery at a previous effectual election during the same parliament. The decision in the *Dungarvon Case* (4) was

(1) 6 T. R. 607.
(2) 3 B. & C. 235.
(3) 9 Q. B. 767, at p. 769.
(4) 2 Pow. R. & D. 300.

1870

STEVENS v. TILLETT.

that the committee would not go into an inquiry whether bribery had been committed at a former election during the same parliament, that former election being dissevered from the one in question by the election of a member against whom no successful petition had been presented. But it is remarkable that the same committee, whilst they decided to reject evidence of bribery committed at such former election, admitted evidence of treating committed at such former election,—a decision which at first sight seems to be inconsistent. But the whole matter is explained by reference to the 5 & 6 Vict. c. 102, one of the series of Acts relating to this subject, being one of the Acts for the preventing of corrupt practices; for, by the 22nd section of that Act, any person who was guilty of treating was made "incapable of being elected or sitting in parliament for that county," and so on, "during the parliament for which such election shall be holden." As the 43rd section of the present Act is limited to bribery, so the 22nd section of the 5 & 6 Vict. c. 102 was limited to treating. That explains the apparently contradictory decisions of the committee in the *Dungarvon Case.* (1) Those decisions, however, appear to me to have now become immaterial; because the 17 & 18 Vict. c. 102, the Corrupt Practices Prevention Act, 1854, s. 36, expressly enacts as follows (and it is remarkable that that Act was passed during the session in which the Dungarvon committee sat, but it did not apply to the election upon which that committee was sitting: it is at the end of the Act, and apparently introduced for the purpose of supplying a defect):—"If any candidate at an election for any county," and so on, "shall be declared by any election committee guilty by himself or his agents of bribery, treating, or undue influence" (any of the three) "at such election, such candidate shall be incapable of being elected or sitting in parliament for such county," and so on, "during the parliament then in existence." And it is under that section, I take it, you may now present a petition at any time during the same parliament,—that you may say, A. B. was guilty at such election during this parliament, and I ask you to declare that he was so under s. 36, and in the same breath to declare that he was improperly elected at the last election.

(1) 2 Pow. R. & D. 300.

1870

STEVENS v. TILLETT.

A similar point arose in the *Westbury Case* (1), which was very ably argued by Parry, Serjt., who insisted that I was not right in proceeding to unseat the member there, because there had been no previous declaration of any committee or election judge. I held that it was not so; that I had power to declare that he had by his agents been guilty of intimidation; and that therefore he could not sit: and I apprehend that that 36th section is the pivot now of all these proceedings. It is material to bear that section in mind, because it may affect a great many questions arising out of this Act, and it most materially affects the question whether under the circumstances votes are thrown away, upon which it would be premature and improper to pronounce any opinion. It would have been wrong not to throw this point out, as it occurred to my mind.

That is all I have to say upon the subject. I am almost sorry to have gone into it at so great length. It is one, no doubt, of the greatest possible importance; and I entirely agree with my Lord that it is fortunate for the parties that the matter has, by the course taken by my Brother Byles at chambers, been brought before the Court for a solemn decision before the petition went down to trial. Having fully considered it, I come to the conclusion, as my Lord has done, that the clauses in question ought to stand in the petition, and the matter must be disposed of by a regular trial before an election judge under the 4th section.

KEATING, J. I am of the same opinion. I think these clauses must be restored to the petition. The reasons for that opinion have been so fully stated by my Lord and my Brother Willes, in which I entirely concur, that I shall not feel it necessary to diminish their effect by attempting to repeat them. I, however, wish to express my entire concurrence with the observations which have been made, that, in the administration of this most important jurisdiction confided to us by the House of Commons, we ought to be most particular in adhering to the words of the Act of Parliament by which our discretion is governed; and I think too much importance cannot be attached to the marked difference that the legislature has made in unmistakeable terms between the effect of

(1) 1 O'Mal. & Hard. 47.

1870

STEVENS v. TILLETT.

the *determination* of the judge on which he is to *certify* to the House of Commons, and the *report* which he is to make under certain circumstances. That report has by no means the same conclusive effect given to it that is given to the certificate as to the status of the member. It appears to me that, without disregarding the plain terms of this Act of Parliament, even if my Brother Martin had reported upon this matter, we could not have given to it the effect sought to be given to it by Mr. Manisty; but it does not appear to me that he has reported upon it; he seems to have expressed an opinion,—I have no doubt a right and proper one, upon the evidence before him,—that the proceedings were perfectly pure. He did so with reference to the cases brought under his notice; and I quite agree with my Brother Willes that, as to those cases so brought before that learned judge and decided by him, neither in point of propriety, nor in point of procedure under this Act, nor in point of law, ought those cases again to be inquired into by his successor. But, giving the fullest effect to his report, and his opinion expressed after hearing the evidence before him, it would be going far beyond the power given by this Act of Parliament to say that the petitioner was precluded from shewing that circumstances had since come to his knowledge which had not and could not have come to his knowledge upon the previous occasion by any fair and reasonable amount of diligence on his part, and that he was prepared to shew that those circumstances which had subsequently become known, affected the opinion which had been previously expressed. I think, therefore, that that report by no means excludes the giving of such evidence as that to which I have referred.

I would add that I should be sorry to have it supposed that in this decision of ours we were contravening in the slightest degree the provisions of s. 26 of this Act of Parliament. If it had been shewn clearly that it was the practice and the law of committees of the House of Commons to give that effect which Mr. Manisty and Mr. Rodwell so ably contended ought to be given to the report upon this occasion, I should unquestionably have considered myself bound, under the terms of s. 26, to give effect to that law and practice. But, so far from the law and practice of parliament having been established to be as contended for, I come to the con-

clusion that it was the other way; and, looking to the cases that have been already referred to by my Lord, particularly the second *Cheltenham Case* (1), that the proceedings of committees were exactly the opposite of that which has been contended for so skilfully by Mr. Rodwell, upon a foundation which I cannot help thinking has utterly failed, viz., the *Canterbury Case* (2), a case which, when examined, really comes to nothing, or, if it comes to anything, amounts rather to an argument pointing in the same direction as the very distinct decision in the second *Cheltenham Case.* (1)

Under these circumstances, again expressing my entire concurrence in the reasons which have been already given in detail by my Lord and my Brother Willes, I come to the conclusion that those clauses which have been ordered to be struck out of the petition ought to be restored.

BYLES, J. This order gave the petitioner power to stay the proceedings till he had had an opportunity of taking the opinion of this Court. He, therefore, has had the benefit of a decision of the highest authority defining his exact position in more respects than one, before he undertakes the expense and risk of going down to trial.

The case is one in which there can be no writ of error or appeal. Therefore, I do not feel justified in expressing any opinion which would prevent a unanimous judgment, though I am sensible how little my opinion would detract from the weight of the judgment, even though it were adverse to it. This decision, therefore, must be taken as the judgment of the whole Court.

Rule absolute.

Agents for petitioner: *E. Flux & Leadbitter.*
Agents for respondent: *Whites, Renard, & Floyd.*

(1) 1 Pow. R. & D. 224. (2) Clifford's *Southwark Case*, 353, 357.

1870
Dec. 1.

[IN THE EXCHEQUER CHAMBER.]

NEWINGTON *v.* LEVY. (1)

Pleading—Confession of Plea under Rules 22 *and* 23 *of T. T.* 1853—*Estoppel—Release subject to Condition subsequent — Composition-deed under Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134).

To an action on a bill of exchange, the defendant pleaded that the plaintiff sued him in a former action for the same cause, to which the defendant, on the 3rd of November, 1868, pleaded to the further maintenance of the action a deed of composition under the Bankruptcy Act, 1861, dated the 8th of October, 1868 (which was after action brought), whereby the defendant covenanted to pay his creditors 1*s.* in the pound by two instalments of 6*d.* each on the 6th of April and 6th of August, 1869, in consideration of which the creditors released the defendant from their several debts, with a proviso that, if default should be made by the defendant in payment of the composition, the deed should become void and the creditors should not be bound by the covenants therein contained; that, on the 13th of April, 1869, the plaintiff replied that the defendant failed to pay the instalment due on the 6th of April, 1869, whereby the deed and the release therein contained became void; that the defendant rejoined equitably that the 6th of April, 1869, was subsequent to the date of the plea, and that he had by mere mistake omitted to pay the instalment on that day, but before replication, viz. on the 8th of April, 1869, he tendered it to the plaintiff; that, on the 25th of May, 1869, the plaintiff confessed the plea, withdrew his replication, and taxed and received his costs, and so the first action was finally determined against the plaintiff (except as aforesaid); and that the plaintiff was estopped from bringing a fresh action for the same cause.

Replication, that the plaintiff ought to be admitted to implead the defendant, by reason of the defendant's failure in the due payment of the instalment of the composition on the 6th of April, 1869, whereby the release became null and void. Demurrer:—

Held, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the effect of the confession of the plea in the former action, under rules 22 and 23 of Trinity Term, 1853, was to put an end to the litigation altogether as it stood at the time of the confession; that the plaintiff might have replied in the former action that the release, which was itself after action, though operative when pleaded, became avoided by non-payment of the composition; and that, having omitted to avail himself of the opportunity of doing so, the plaintiff was estopped from relying upon it in a second action.

A release may be made subject to a condition subsequent:—

Semble (per Blackburn, J.), such a release is, in effect, a covenant not to sue, and is pleadable to avoid circuity of action.

Semble, (per Martin, B.), that the plaintiff would have been equally estopped if the non-payment of the composition had been after the confession of the plea:—

(Per Bramwell, B., and Blackburn, J.), that the plaintiff would not in that case have been estopped.

ERROR upon a judgment of the Court of Common Pleas, upon demurrer to a replication. (2)

(1) Decided in the sittings after Michaelmas Term, 1870.

(2) Law Rep. 5 C. P. 607.

Declaration by plaintiff, as indorsee, against defendant, as acceptor, of a bill of exchange dated the 16th of March, 1868, payable six months after date.

Plea: That, in a former action upon the same bill (the declaration in which was delivered on the 26th of October, 1868), the defendant had on the 3rd of November, 1868, pleaded a plea to the further maintenance of the action, setting up a release under the Bankruptcy Act, 1861, dated the 8th of October, 1868 (which was after the commencement of the former action), whereby the creditors of the defendant (including the plaintiff) released the defendant from their respective debts in consideration of the payment of a composition of 1*s.* in the pound by two instalments of 6*d.* each, payable respectively on the 6th of April and 6th of October, 1869; that, on the 13th of April, 1869, the plaintiff replied that the release was subject to a defeasance making the same null and void if the debtor should make default in payment of the composition, and that default was made in payment of the instalment due on the 6th of April, 1869, and consequently that the release was void; that, on the 17th of April, 1869, the defendant, by way of equitable rejoinder in that action, rejoined that the 6th of April, 1869, was subsequent to the day on which the defendant's plea was pleaded, and that the defendant, by reason of a mere mistake as to the day on which the said instalment was payable, omitted to tender the instalment on that day, but that before the time of pleading the replication, viz. on the 8th of April, 1869, he tendered it to the plaintiff, and was still ready and willing, &c., but that the plaintiff refused to accept the same; that, on the 25th of May, 1869, the plaintiff withdrew his replication and confessed the plea, and had judgment for his costs pursuant to Reg. Gen. Trinity Term, 1853, rr. 22, 23, which costs were afterwards duly taxed and paid. The plea concluded with an averment that all conditions had been fulfilled to estop the plaintiff from bringing a second action for the same cause as that for which the first action was brought.

To this plea the plaintiff replied substantially as he had replied in the former action; and the defendant demurred to the replication.

The Court of Common Pleas held that the plea was a good answer to the action, and that the replication was bad.

1870

NEWINGTON v. LEVY.

The plaintiff brought a writ of error.

R. Vaughan Williams for the plaintiff. Two questions were raised in the court below,—1. As to what was the effect of the plaintiff's confession of the defendant's plea in the former action,—2. Assuming it to be the same as if the defendant had recovered judgment, was it competent to or obligatory on the plaintiff to reply puis darrein continuance a matter which arose after plea pleaded. It was conceded that a mere discontinuance creates no estoppel; and there is nothing in the Common Law Procedure Acts which makes the effect of a confession in any respect different. At any rate, the confession of a plea only estops the plaintiff from afterwards denying its truth at the time it was pleaded; and the replication always speaks as of the date of the plea. The Common Law Procedure Acts make no mention of a replication puis darrein continuance; and the only instance to be found of such a replication is in the case of *Eyton* v. *Littledale* (1), where a replication puis darrein continuance was allowed to a plea of set-off. But the reason of that is, that the plaintiff, in replying to a plea of set-off, is for most purposes to be treated as a defendant.

[BLACKBURN, J. Such replications would necessarily be rare: but, I apprehend, the word "plea" in s. 59 of the Common Law Procedure Act, 1852, is meant to embrace *all* pleadings.]

An estoppel only applies to matters which are substantially in issue between the parties, and which appear on the face of the record: *Duchess of Kingston's Case.* (2)

[BLACKBURN, J. Or which might have been put upon the record. If it might have been raised, and the plaintiff, instead of replying it, chooses to confess the plea, he cannot afterwards set it up.]

In *Le Bret* v. *Papillon* (3), the plaintiff, who was an alien *amy* at the time of action brought, became an alien *enemy* before plea pleaded, and the defendant pleaded that the plaintiff ought not *to have or maintain* his action, because he was before *and at the time of exhibiting his bill,* and *now* is, an alien enemy, &c., concluding that therefore the plaintiff ought to be barred from *having or maintaining* his action, &c. To this the plaintiff replied that, *at the time*

(1) 4 Ex. 159; 18 L. J. (Ex.) 369. (2) 2 Sm. L. C. 6th ed. 679.
(3) 4 East, 502.

1870

NEWINGTON v. LEVY.

of exhibiting his bill, he was an alien amy, wherefore he *prayed judgment and his damages:* and it was held on demurrer that the plea was ill pleaded; but, as the Court were ex-officio bound to give such judgment as appeared upon the whole record to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side, and as it appeared upon the whole record that the plaintiff was now an alien enemy, and therefore incapable of maintaining further his suit, judgment was given that he be barred from *further* having or maintaining his action. There the whole matter appeared on the record. The general rule is, that a cause of action must be perfect at the time the action is brought, and cannot be amended by a replication puis darrein continuance. To rely upon new matter would be a departure.

[LUSH, J. At the time of the commencement of the first action, the plaintiff has a good cause of action. The defendant pleads a release given subsequently to the commencement of the action. The plaintiff replies shewing that by matter subsequent the release, which was conditional only, has become avoided. Such a replication would be no departure, but confirmatory of the original cause of action.

BRAMWELL, B. In Com. Dig. Abatement (H. 42.), it is said that it may be pleaded in abatement that the plaintiff took husband pending the writ, and that "the plaintiff may reply that her husband is dead, and that she is now sole." And for this reference is made to the Year Book, 9 Hen. 5, fo. 1.]

It is consistent that the husband in that case might have been dead at the time of plea pleaded.

[BLACKBURN, J. The plea must have averred that the husband "is *now* living."]

For the proposition that a release may be given subject to a condition subsequent, it is sufficient to rely upon the judgment in the court below.

Arthur Wilson, contrà, was not called upon.

KELLY, C.B. I am of opinion that the judgment of the Court of Common Pleas should be affirmed. The case is one of some intricacy and difficulty, inasmuch as the proceedings in the first

1870

NEWINGTON v. LEVY.

action are of a novel description. It becomes necessary, therefore, to consider the condition of the parties at each stage of the first action. Now, the action was upon a bill of exchange. The bill was dated on the 16th of March, 1868, payable six months after date, and consequently became due on the 19th of September, 1868. The date of the declaration in the first action was the 26th of October, 1868. At that time the composition-deed hereafter mentioned had not been executed. On the 3rd of November, 1868, the defendant delivered a plea setting up a release under a composition-deed entered into (after the commencement of the action, viz. on the 8th of October, 1868,) under the provisions of the Bankruptcy Act, 1861, between himself and his creditors, of whom the plaintiff was one, by which deed the creditors released the defendant from their respective debts; and so the debt sought to be recovered in that action was released. The plaintiff allowed several months to elapse, and it was not until the 13th of April, 1869, that he delivered his replication. The composition-deed contained a covenant by the defendant to pay the creditors a composition of 1*s.* in the pound on the amount of their respective debts, by two instalments of 6*d.* each, the first of which became due on the 6th of April, 1869. That day having passed, and the proceedings in the action having been suspended, the plaintiff put in a replication to this effect, viz. that the release was subject to a defeasance making the same null and void if the debtor should make default in payment of the composition, and that default was made in payment of the instalment due on the 6th of April, 1869, and consequently that the release was void. It was contended, in the first place, that the plaintiff was not at liberty, according to the rules and practice of the Court, to plead this replication. But I am of opinion that he was. The plaintiff having originally a good cause of action, and the defendant having pleaded a plea which was a primâ facie answer to the further maintenance of the action, then as it appeared by the deed which the defendant relied on that he had covenanted to pay the first instalment of 6*d.* in the pound on the 6th of April, 1869, and default had been made in payment of that instalment, and that default had the effect of defeating the release by matter ex post facto, I do not hesitate to say, independently of any authority, but upon the true principles of law and special pleading, that the

plaintiff was at liberty to shew by his replication that by matter ex post facto the release was nullified and the defence failed. I am also of opinion that that replication was a good replication, in point of law, at the time it was put upon the record in that action, and entitled the plaintiff, by reason of matters occurring subsequently to plea pleaded, to maintain his action as originally brought, and as it appeared by the declaration. If the matter had rested there, and the defendant had demurred to the replication, or had taken issue upon it, and there had been a verdict against the defendant, the plaintiff would have been entitled to the judgment of the Court for the amount of the bill. It is, however, averred in the plea which the defendant has pleaded in this action, that, on the 17th of April, 1869, the defendant, by way of equitable rejoinder in that action, rejoined that the 6th of April, 1869, was subsequent to the day on which the defendant's plea was pleaded, and that the defendant, by reason of a mere mistake as to the day on which the said instalment was payable, omitted to tender to the plaintiff the said instalment on the said 6th of April, but that before the time of the pleading of the said replication, viz. on the 8th of April, 1869, the defendant tendered to the plaintiff the said instalment, and had since always been ready and willing to pay to him the same, and had the same ready to be paid to him, and craved, as the plaintiff refused to accept the same, for leave to pay the same instalment into court. Now, I have no hesitation in saying that that was a good rejoinder, and that, if the plaintiff had demurred to that rejoinder, the defendant would have been entitled to the judgment of the Court. No doubt, at law, the instalment being payable on the 6th of April, and there being a proviso in the deed making the release defeasible in case of default, and default having been made, the release became void and no answer to the action: but in equity it would be otherwise; for, it is always a good answer in equity to shew that the default arose from a mere mistake, and that the money was tendered within a reasonable time, and before suit, or before the situation of the parties had been altered, or the other party had proceeded to avail himself of the default. And, the rejoinder being an equitable one, there was no necessity for averring payment of the money into court; it was enough to allege a tender and readiness to pay.

1870

NEWINGTON v. LEVY.

This rejoinder, therefore, which does aver readiness and willingness, and craves leave to bring the money into court, appears to me to have been a good answer to the replication. Instead of taking issue, or demurring to this rejoinder, the plea goes on to allege that, on the 25th of May, 1869, the plaintiff confessed the plea of the defendant, and declined further to prosecute his suit in respect of the causes of action to which the plea was pleaded, and prayed judgment for his costs of suit. It is true that the replication was withdrawn; but, at the time the plaintiff confessed the plea, the replication and rejoinder were upon the record. It amounts, therefore, to this:—The plaintiff says, "I brought an action against you, the defendant, upon a bill of exchange. You pleaded in answer a release which was good and effectual at the time of plea pleaded, but which release subsequently by reason of your default in payment of the instalment of the composition became void; you have answered that by shewing that the non-payment of the instalment at the day was a mere mistake or oversight, and that you tendered it before I took advantage of the default. I admit that your rejoinder is an answer to my action." Accordingly, the plaintiff confesses "the plea," that is, the pleadings as they then stood upon the record. In effect, the plaintiff says, "I admit I am answered, because upon the whole pleadings I cannot maintain my action." The plaintiff prays judgment for his costs. He was entitled to them; and he has had them. That is in effect a judgment against the plaintiff in the action. The plaintiff became disentitled to maintain the action; but, inasmuch as this occurred in consequence of something which arose between the replication and the rejoinder, he was by the practice of the Court entitled to costs. It is upon this that the Court below in their judgment say (1): "We are further of opinion that the intention of the rules 22 and 23 of Reg. Gen. Trinity Term, 1853, was not merely to allow the plaintiff to enter a nolle prosequi to the particular action, receiving costs instead of paying them, but to put an end to the litigation altogether as it stands at the time of the confession, the plaintiff electing to abandon the claim as it then exists, and to let the defendant go free, in consideration of receiving the costs of the

(1) Law Rep. 5 C. P. at p. 612.

action, which was properly commenced, though met by an answer of matter subsequently arising." I entirely concur in that part of the judgment; and, consequently, I am prepared to hold that the effect of the judgment by confession in the first action was to put an end to the litigation, and to afford a complete answer to the plaintiff's cause of action as it existed at the time of the judgment. If, therefore, the plaintiff could maintain this action,—which was commenced before the second instalment of the composition became due, and when the rights of the parties were precisely the same as they were at the time the judgment in the first action was signed,—he might be bringing action after action for the same cause; which would be contrary to common sense and justice, and a violation of the principles of the law as to res judicata and estoppel. It is unnecessary to say more than that it appears to me to be quite clear that, upon this judgment having been obtained and acted on by the parties, the claim of the plaintiff is completely answered and finally put an end to, unless there be a further defeasance of the release contained in the composition-deed, by reason of a new default. I will only add that I concur entirely in the reasons given throughout the judgment of the Court below, and am of opinion that, as well upon the merits and justice of the case as upon the technical rules of practice, that the judgment is right, and must be affirmed.

MARTIN, B. I also am of opinion that the judgment of the Court of Common Pleas should be affirmed. I am not aware of any rule of pleading which deprives a man by estoppel of any just defence he may have. But the facts of the present case are simple. The plaintiff was the holder of a bill accepted by the defendant. He brought his action upon it, and the defendant pleaded a release contained in a deed of composition. That plea was pleaded in conformity with the Act of Parliament, and afforded a good defence to the action at the time it was pleaded. But the release was conditional on the payment of a composition of 1*s.* in the pound, 6*d.* on the 6th of April, 1869, and 6*d.* on the 6th of October, 1869. The 6th of April, 1869, arrived, and the first instalment of 6*d.* in the pound was not duly paid. The plaintiff then (on the 13th of April) replied, as he had a right to do, that the instalment was unpaid and the

1870

NEWINGTON v. LEVY.

release consequently void. The effect of that replication was to remit the plaintiff to his original rights. The defendant, however, rejoined that his omission to tender the instalment on the day was a mere mistake, and that he tendered the amount before replication and had always since been ready and willing to pay it to the plaintiff. That being (as I assume) a good answer in equity to the plaintiff's replication, the plaintiff confesses the plea, and claims and receives his costs, and judgment is accordingly entered for the defendant. Two months afterwards the plaintiff brings a second action upon the same bill, and the defendant in his plea sets out all the proceedings in the first action. The plaintiff replies, as before, the non-payment of the instalment of the composition due on the 6th of April, 1869. To this replication the defendant demurs. It seems to me that precisely the same matter which was brought before the Court in the former action is involved in the second action; and that, if ever there was a case to which the maxim "Nemo debet bis vexari pro una et eadem causa" was applicable, it is this case. "Causa," in my opinion, means the cause of action; and, when once a cause of action has been brought into court, and judgment has been given upon it, I think the matter is altogether at an end, and cannot be started again, though some of my learned Brothers seem to think otherwise. That, however, is my strong impression: and I find this matter enlarged upon in the judgments of two learned judges referred to in Broom's Maxims, 5th ed. pp. 329, 331. Thus, in *Greathead* v. *Bromley* (1), Lord Kenyon says: "If an action be brought, and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although perhaps some objection or argument might have been urged upon the first trial which would have led to a different judgment." I apprehend that the merits of the question may be said to have been discussed between the parties, when they agree that the merits are all one way. Again, in *Langmead* v. *Maple* (2) my Brother Willes says: "I apprehend that if the same matter or cause of action has already been finally adjudicated on between the parties by a Court of competent jurisdiction, the plaintiff has lost his right to put it in

(1) 7 T. R. 456. (2) 18 C. B. (N.S.) 255, 270.

suit either before that or any other Court. The conditions for the exclusion of jurisdiction on the ground of res judicata are, that the same identical matter shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been decided." If the parties have had an opportunity of controverting it, that is the same thing as if the matter had actually been controverted and decided. For these simple reasons, I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

BRAMWELL, B. I also think that the judgment of the Court of Common Pleas must be affirmed. The first question which arises is, whether where a plaintiff replies, as this plaintiff did eventually, by confessing the plea, and taking his costs, he precludes himself from bringing a fresh action unless fresh circumstances arise. I am of opinion that he does, and that the matter is res judicata as to everything which might have been controverted at the time he made such confession. He is estopped from setting it up again. But I also think that, if new circumstances had arisen (I purposely use a general expression), a fresh action might have been brought. If, for example, the action were brought too soon, the debt claimed not being due at the time of the issuing of the writ; or if, as here, there was a release operative at the time of plea pleaded, but defeasible by something which occurred subsequently; in these cases, as it seems to me, a confession of the plea, with judgment for the defendant, would not be res judicata as to the matter subsequently arising. In other words, if the plaintiff in the present case had confessed the plea in the first action before the 6th of April, 1869, I should have thought it clear that he might have maintained this action. He brought his action properly. The deed set up by the plea afforded a good answer; and the plaintiff stayed his hand. To say that, under these circumstances, the plaintiff was precluded from bringing a fresh action when the defendant's default rendered the release void, would be a gross injustice. If the plaintiff had replied at once to the plea in the first action, there would have been nothing to preclude him from bringing this action on the defendant's making default. It would only have been res judicata if the condition in the deed were per-

1870

NEWINGTON v. LEVY.

formed. But, in point of fact, the plaintiff did not reply until after the 6th of April, when the defendant was in default. Now, what was the consequence of that? It seems to me clearly and without hesitation that we have nothing to do with the replication and rejoinder which were afterwards struck out, and that there can be no estoppel and no adjudication as to matter which does not appear upon the record. All the matter which we have practically before us is this:—The plaintiff brought his action, the defendant pleaded to the further maintenance of the action a deed of release which came into existence after the commencement of the action, and the plaintiff confessed the plea. Now, what is the consequence of that? If the plaintiff could, after the 6th of April, 1869, have replied the non-payment of the instalment due on that day, he ought to have done so: having missed his opportunity, he could not have done it afterwards. The question, therefore, to my mind, is reduced to this:—Could the plaintiff, at the time he confessed the plea, have avoided the effect of the defence? That is a matter upon which I must confess I have felt much doubt; but I yield to the opinion entertained by the other members of the Court. In addition, there is the authority cited from the Year Book, 9 Hen. 5, fo. 1, which is clothed with increased value by its adoption by Chief Baron Comyns: Com. Dig. Abatement (H. 42). We may assume, therefore, that a plaintiff may reply matter which has arisen after plea pleaded. Suppose the plea had not been pleaded until after the 6th of April, 1869, it must still have been a plea to the further maintenance of the action: would not the defendant have been bound to allege that the instalment was duly paid? and would not the plaintiff have been at liberty to say that the instalment was not paid at the time? Does it make any difference that he could not have done so at the time of plea pleaded, but that at a subsequent time he could? It may be that there is a difference; but I own I fail to see it. I come to the conclusion that the plaintiff might have replied, as he did in fact (on the 13th of April), the default in payment of the composition due on the 6th of April; that it was a good replication in point of law; and that the plaintiff might have had it adjudicated on; and consequently that he has missed his opportunity, and cannot set it up now.

1870

NEWINGTON v. LEVY.

CHANNELL, B. I also think the judgment of the Court below should be affirmed. I decline to give any opinion as to whether the equitable rejoinder was a good one or not: it is not necessary for the disposal of this case. The question appears to me to be whether or not the plea in the former action became avoided by the non-payment of the first instalment of the composition. At the time the plea was pleaded, the plaintiff had no answer to it. He did not confess the plea until the 25th of May. The question is whether he could have then replied that the release was avoided by subsequent events. I think he might, and that he lost his opportunity, and cannot set up that answer now, or rely upon it in a fresh action.

BLACKBURN, J. I also think the judgment of the Court of Common Pleas should be affirmed, and very much for the reasons given by my Brother Willes. There is under the technical matter here a substratum of justice. The first question that arises is, what is the effect of the release in the deed of composition pleaded in the first action? By that deed the creditors release the defendant from their respective debts in express terms; and in equally express terms it is declared that, if default should be made in payment of the composition, the release should be void. The question (which has never yet arisen in a court of error) is, whether this is pleadable as a defence, where the matter which is to undo the release has not yet happened. I think it is. The old rule was that a right of action once suspended is gone for ever. To avoid that, where it was evidently contrary to what the parties intended, the Court of Exchequer Chamber, in *Ford* v. *Beech* (1), construed the agreement, not as suspending the plaintiff's remedy on the promissory notes there sued upon, but as giving the defendant merely a right of action for breach thereof, if the plaintiff sued whilst the payments were continued, that is, as a covenant not to sue for a limited period. It must, however, be taken to be established that, where a covenant not to sue is in terms expressed to be intended as a release, and where the rights of a surety do not intervene, it is, in order to avoid circuity of action, an answer to the plaintiff's claim. A release which in terms is subject to a defeasance amounts to a

(1) 11 Q. B. 852.

1870

NEWINGTON v. LEVY.

covenant not to sue, except upon the happening of the event contemplated. Such a release is not open to the objection taken in *Ford* v. *Beech*. (1) It very rarely could happen that matter subsequent could undo that which had suspended the plaintiff's right of action, and therefore practically it was enough to say that a right of action once suspended is gone for ever; and I am not surprised that the research of Mr. Williams has failed to enable him to find an instance of such a replication as this. But, where there is a covenant not to sue which is pleadable as a defence only to prevent a cross-action, anything which would have been an answer to the cross-action upon the covenant may be set up as an answer to the plea; as in the case of *Eyton* v. *Littledale* (2), where it was held to be a good replication to a plea of set-off, that after plea pleaded the plaintiff paid the debt. That brings me to the facts of the present case. The plea shews that this action is brought for the same cause as the former action. In that action the defendant pleaded the deed puis darrein continuance. That was a good plea when pleaded. Time went on. The 6th of April, 1869, the day on which the defendant ought to have paid the first instalment of the composition, arrived, but the composition was not paid; consequently, the defeasance came into operation, and the deed ceased to be a good answer to the action. Instead, however, of relying upon the default by way of replication, the plaintiff confesses the plea, and takes judgment for his costs down to the time of the plea. Although I think the plaintiff might have replied the non-payment of the instalment, the fact that there was a replication and a rejoinder, both of which were withdrawn, is to my mind immaterial. No question now arises upon the rejoinder, though, as at present advised, I would observe that I see no equity to support it. Having thus neglected to reply the non-payment of the instalment of the composition, the question is whether the plaintiff can afterwards avail himself of it in another action. It seems to me, that, having had an opportunity to reply it, and having neglected to avail himself of that opportunity, he is now concluded. Unless there be a difference in this respect between a plea in abatement and a plea in bar,—which I think there is not,—the authority cited by my Brother Bramwell in the course of the argument, from the

(1) 11 Q. B. 852. (2) 4 Ex. 159; 18 L. J. (Ex.) 369.

Year Book of 9 Hen. 5, and which appears to have received the sanction of Chief Baron Comyns, seems to me to be very much in favour of such a replication. The principle is that the Court is bound to give judgment upon the whole record. I incline to think that the doctrine of res judicata applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the Court. But, if there be matter subsequent which could not have been brought before the Court at the time, the party is not estopped from raising it. In the present case, however, by the non-payment of the instalment of the composition due on the 6th of April, 1869, the covenant not to sue came to an end before the confession of the plea, and might and ought to have been taken advantage of at the time. I think the judgment of the Court below should be affirmed.

PIGOTT, B. I am of the same opinion, and I am content to rest my judgment upon the reasons given by my Brother Willes in the Court below, to which I think it unnecessary to add anything. I desire not to be understood to give any opinion as to whether or not the rejoinder was a good rejoinder in equity. Nor am I disposed to dispute the proposition contended for by Mr. Williams, that a plaintiff cannot mend his cause of action by matter arising puis darrein continuance. But here the replication in effect is that the plea was a good answer at the time it was pleaded, but was defeated by matter subsequent.

LUSH, J. I also think the judgment should be affirmed. My mind has not been affected by the doubts which seem to have been entertained by some members of the Court. At the time the plaintiff confessed the plea in the first action, the very matter existed which he now relies on, viz. the defendant's default in payment of the instalment due on the 6th of April, 1869. There can be no doubt that the plaintiff might have replied the default, for it would have displaced the defence, and remitted him to his original right of action. Instead, however, of standing on his right to reply, the plaintiff elected to confess the plea. To allow him afterwards to bring a second action, and to say I had an answer to the plea in the former action, but, to entitle myself to costs, I

1870

NEWINGTON v. LEVY.

chose not to avail myself of it on that occasion, would be gross injustice. The plaintiff is bound by his confession. It is immaterial, I think, to consider whether the plea in the first action was good or bad. The proper mode of contesting that is by demurrer and writ of error, and not by bringing a second action. The plaintiff cannot get rid of the estoppel by shewing that the judgment was erroneous. It seems to me that the plaintiff bound himself by confessing the plea, and that the estoppel is complete.

Judgment affirmed.

Attorney for plaintiff: *J. C. Hall.*
Attorneys for defendant: *Foster & Payne.*

1871
Feb. 20.

IN RE PALMER AND THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Railway Company—Injunction under Railway and Canal Traffic Act (17 & 18 Vict., c. 31), s. 2—Undue Preference.

A railway company, with a view to compete with other carriers in the collection and carriage of goods, established receiving-offices in various parts of London, from which goods were brought in vans to the railway station. The gates of the station were closed against the vans of the complainant and other carriers at 6.30 P.M., but the company's own vans were admitted at a much later hour, and the goods brought by them were forwarded by the same night's trains:—

Held, that this was giving an undue and unreasonable preference to the company's own traffic, to the prejudice of the complainant; and a rule for an injunction under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), s. 2, was made absolute, with costs.

Quære, whether a course of business necessary for securing an advantage to the public, which at the same time gave a monopoly to the company, would be an undue or unreasonable prejudice to other carriers.

Re Palmer and London and South Western Ry. Co. (Law Rep. 1 C. P. 588) observed upon.

RULE obtained on behalf of David Palmer, a carrier, to shew cause why a writ of injunction should not issue against the London, Brighton, and South Coast Railway Company, pursuant to the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), to restrain the company from violating or contravening the said Act, and injoining obedience to the same; and to restrain the company from subjecting the complainant and his traffic to

undue and unreasonable prejudice and disadvantage, in refusing to receive his goods at the company's station, Willow Walk, Bermondsey, after the time fixed by the company, viz. 6.30 P.M., while they receive at such station at a later time goods collected by themselves; and to restrain the company from giving undue and unreasonable preference and advantage in any respect whatsoever to and in favour of themselves, by receiving goods at their said station collected by themselves after the time at which they will receive the complainant's goods and goods collected and taken to such station by the complainant to be carried on the railway of the company; and to restrain the company from subjecting the complainant to any undue or unreasonable prejudice or disadvantage in any respect whatsoever as to the matters referred to in the affidavits, or the receiving of goods for the complainant at the said station, to be carried on the railway,—with costs.

The material parts of the affidavit of the complainant used upon the argument of the rule were as follows:—

1. I am a carrier carrying on business in Old Fish Street and Great Trinity Lane, in the city of London, and at the King's Head Inn, High Street, Southwark, where I receive goods and parcels to forward to the country, employing seven vans.

4. The company carry on the business of carriers, and themselves carry on their railway goods and parcels of the like kind to those in the carriage whereof I am engaged; and they have a receiving-house in Cannon Street, near my receiving-house in Old Fish Street, at which place they receive goods and parcels to be so carried by them.

5. At the office in Cannon Street goods and merchandize and parcels are received at all times; and the vans of the company call there and collect such of the said goods, merchandize, and parcels as are left there to be sent by them, at all or any time or times that may be convenient to themselves; and I have seen the vans of the company collect goods and parcels from that receiving-office many times as late as 8 o'clock in the evening, and also from the receiving-office kept at the Swan with Two Necks, Gresham Street, as late as half-past eight in the evening; and many of my customers, knowing by reason of the system adopted by the company that I cannot receive goods or merchandize, to be forwarded by the railway the same night, after about half-past five o'clock in the afternoon, are in the habit of sending their goods which they want to send off late to different receiving-offices where they know the vans of the company are in the habit of calling and collecting. [Instances, with dates, were given.]

22. My carts and vans have on many occasions been refused entering by the superintendent on duty at Willow Walk goods station, and they have been compelled to return loaded to my places of business.

23. By reason of such refusal, and by reason of the company threatening to continue to refuse to permit my carts and vans to enter as aforesaid, goods and

1871

IN RE PALMER AND LONDON, BRIGHTON, &c. RAILWAY CO.

parcels which I have received after five o'clock and before half-past seven o'clock, have been delayed until the next morning; and I am seriously prejudiced in my trade by being unable to receive and forward goods and parcels up to the same hour; and I have been compelled to send the goods and parcels of my customers by the South Western Railway, at considerably increased cost.

25. It takes about half an hour for a cart or van to drive from any of the receiving-houses aforesaid, as well my own as those of the company, to the goods station at Willow Walk.

26. There is not, nor can there from the nature of the case be, any difference, hindrance, or delay, nor any pressure, trouble, or inconvenience caused to the company by having one more than another van-load of goods brought within their gates for forwarding by train that evening. All the goods going by the particular train, whether received by the company early or late, have to be entered on way-bills for the place of their destination, and have to be sorted; and this cannot be completely done until all such goods have been finally brought to the station.

28. I am informed and believe that the company allege that it is necessary for the proper and convenient conduct of their traffic for them to shut their gates to all carriers and strangers at 6.30 P.M., but that they can consistently with their arrangements admit their own vans for a period of about two hours later, and that therefore the company is but doing what is perfectly legitimate in thus trying to secure an advantage for itself and prejudicing those who carry and deliver to the goods station.

29. Such allegations are colourable and misleading. If the company's arrangements are in reality so made as that the reception of carriers' and other persons' vehicles and goods after 6.30 P.M., would entail pressure and inconvenience upon the company, such arrangements have been and are expressly devised and maintained for the purpose of securing to the company and to those who avail themselves of the company's cartage to the station an undue and unfair preference.

30. There is no reason why equal times and limits and equal facilities should not be afforded to all goods by whomsoever delivered at the company's station; and it is untrue to allege that, with proper regulations, the one class, that is to say, those goods which arrive by the vans of third persons, cause any more trouble or delay than those arriving by the company's own vans.

There were other affidavits to the effect that, on one occasion, after one of the complainant's vans had been refused admittance to the station at 7.30 P.M., fifteen of the company's vans laden with goods were admitted; that, on two other occasions, thirty-nine and forty laden vans respectively belonging to the company were so received between 6.30 and 8.45 P.M.; and that the whole of the goods so admitted on those occasions were unloaded and it was believed forwarded by the trains of the same night respectively.

The following are the material parts of the affidavits on behalf of the company:—

Affidavit of Jabez Light, goods manager of the company:—4. For the con-

venience and accommodation of the public, the company have established their principal goods depôt at Willow Walk, Bermondsey, and a receiving-office at St. Thomas's Street, Southwark, and have also appointed no less than fifty-eight receiving-offices in the city of London and other parts of the metropolis, and have given public notice, in their published time-tables and otherwise, that all goods delivered at the Bricklayers' Arms station, Willow Walk, or at the company's office in St. Thomas's Street, or at any of the offices in their city, before 6 P.M., and at any of the other offices before 5 P.M., will be forwarded the same evening, and that goods delivered after those hours will be detained until the following working day. To perform the duty of collecting the goods received by the company at their several receiving-offices, and of conveying them to their Willow Walk station to be there loaded into the trains, the company employ between twenty and thirty vans.

5. To allow for the journey from the receiving-offices to Willow Walk after the vans are loaded, a little grace is allowed in closing the station, and consequently, in practice, all goods brought there are received up to 6.30 P.M., and any special consignment of perishable articles or goods for shipment arriving between 6.30 and 6.45 are also admitted under special order. These arrangements apply as well to the vans of the complainant, Palmer, and other customers of the company like him, as to the vans belonging to the company themselves.

6. The times fixed for the receiving of goods at the Willow Walk station, and at the several receiving-offices, are the latest that can reasonably be allowed for the receipt of goods so as to insure their dispatch by the trains at their appointed hours the same evening, and the delivery of goods to the consignees in due course the following morning.

18. For the safe and proper carrying of the goods, it is necessary that the address upon each package should be checked at Willow Walk, &c., which occupies a very considerable time. The checking, &c., must be done before the invoices which accompany the goods in their transit can be made out, as the invoices must shew all particulars, &c.

22. The company's arrangements for the reception of goods at Willow Walk are made so that all vans, whether belonging to the company or to Palmer or other customers like him, should arrive there at the same time, 6.30; but, as regards the company's vans, it sometimes happens of necessity that those coming from their receiving-offices arrive somewhat later than the prescribed time, owing to the occasional inevitable delays which they meet with in passing through the streets, and to their having to call at so many places en route, and to their being occasionally necessarily delayed in waiting their turn to take up their loads at the larger establishments in the city.

23. A great number of the company's vans, having to start from remote parts of the metropolis, are obliged to begin their loading at a very early hour, viz. about 5 o'clock every evening, and very much earlier than the vans of the complainant,&c. And the company's staff at Willow Walk, knowing the exact number of the company's vans which are daily employed and which have to arrive at Willow Walk every evening, and knowing also their capacity and the average amount of goods which they bring every evening, and being also in many instances previously advised by the receiving-offices of expected consignments, they are well able to make due and proper preparations for whatever goods may be brought by their own vans; and,

1871

IN RE PALMER AND LONDON, BRIGHTON, &C. RAILWAY CO.

although they take every possible precaution and make every possible arrangement to secure the punctual arrival of their own vans, it occasionally necessarily happens that their punctuality cannot be secured: but it would be quite impossible for the company to conduct their business with propriety, punctuality, or safety, if a system obtained by which they were compelled to admit the vans of the complainant and of other customers like him after the time prescribed by the company's regulations.

24. It is from no desire to work any disadvantage to the complainant or to other customers like him that the company insist upon punctuality as regards outside vans; and the occasional relaxation as regards the company's own vans is solely from necessity and causes over which the company have no control, and from a bonâ fide desire to conduct their business in a proper, efficient, and punctual manner consistent with safety and the proper organization of their establishment at Willow Walk, and the running of the trains throughout the company's system. Indeed, it is for the company's interest, as a matter of business, to invite custom from Palmer and from all other persons; and the staff are most anxious to increase business; but the proper conduct of it can only be under the arrangements before detailed, and, although occasionally the company's vans are received at Willow Walk somewhat later than the outside vans, this arises, not from any definite or purposed system, but only in consequence of the necessary exigencies of the case.

31. It would be impossible to extend the times at present fixed for the receiving of goods of Palmer or of other like customers of the company, without seriously endangering the safety and proper conduct of the traffic of the line, and without causing unreasonable delays and losses to the public.

32. The company do afford, according to the best of their power, all reasonable facilities for the receiving and forwarding and delivery of goods and merchandize upon their line of railway, and have not made or given any undue or unreasonable preference or advantage to or in favour of any particular persons or any particular description of traffic, in any respect whatsoever, and have not subjected the complainant or any other person, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever. (1)

Jan. 25, 28. *Lopes, Q.C.*, and *Joyce*, shewed cause.

The affidavits filed in answer to the rule distinctly shew that the course pursued by the company is under all circumstances the most convenient for the public, and that no intentional prejudice or difficulty is thereby cast upon the complainant or upon any other carrier. The very language of s. 2 of 17 & 18 Vict. c. 31 implies that the company's mode of conducting their business may without infringing its provisions operate in some degree to the prejudice of individuals; but to constitute a ground of complaint, the prejudice must be "undue," that is, excessive or unreasonable, or inconsistent with or not warranted by the fair exercise of the

(1) There were two other affidavits; but they contained mere formal matter.

duty which the company owes to the public. This is the fair result of all the cases on the subject: see *Re Barret and Great Northern Ry. Co.* (1); *Re Ransome and Eastern Counties Ry. Co.* (2); *Re Oxlade and North Eastern Ry. Co.* (3); *Re Beadell and Eastern Counties Ry. Co.* (4); *Re Ransome and Eastern Counties Ry. Co.* (5); *Re Baxendale and Great Western Ry. Co., Reading Case* (6); *Re Nicholson and Great Western Ry. Co.* (7); *Re Garton and Bristol and Exeter Ry. Co.* (8); *Re Baxendale and London and South Western Ry. Co.* (9); *Re Palmer and London and South Western Ry. Co.* (10)

[BRETT, J. Do you contend that the injunction ought not to go, if the course habitually pursued by the company is prejudicial to an individual, and undue in the sense of being unreasonable, provided it is for the convenience of the public?]

That is the result of the judgment of Erle, C.J., in *Re Palmer and London and South Western Ry. Co.* (10), the circumstances of which are almost identical with the present case.

[MONTAGUE SMITH, J. The substantial meaning of that judgment (in which I in the main concurred) is, that the company must act fairly, and not so as to exclude competition.]

There must be a fixed hour for closing the station against the general carriers; and it would obviously be impossible for the company, regard being had to the convenient conduct of their business, as disclosed in par. 22 of Light's affidavit, to relax the rule in favour of the complainant.

[BRETT, J. The preference given by the company to their own trade, whatever be the motive, is clearly a disadvantage to the complainant and the other independent carriers.]

No doubt it may be: but the question is whether it is undue. The affidavits shew that it is only upon exceptional occasions that

(1) 1 C. B (N.S.) 423; 26 L. J. (C.P.) 83.

(2) 1 C. B. (N.S.) 437; 26 L. J. (C.P.) 91.

(3) 1 C. B. (N.S.) 454; 26 L. J. (C.P.) 129.

(4) 2 C. B. (N.S.) 509; 26 L. J. (C.P.) 250.

(5) 4 C. B. (N.S.) 135; 27 L. J. (C.P.) 166.

(6) 5 C. B. (N.S.) 336; 28 L. J. (C.P.) 81.

(7) 5 C. B. (N.S.) 366; 28 L. J. (C.P.) 89.

(8) 6 C. B. (N.S.) 639; 28 L. J. (C.P.) 306.

(9) 12 C. B. (N.S.) 758; 32 L. J. (C.P.) 225.

(10) Law Rep. 1 C. P. 588.

1871

IN RE PALMER AND LONDON, BRIGHTON, &C. RAILWAY CO.

the vans of the company are received into the station after the prescribed hour, and that the company do not systematically violate the rule.

H. Lloyd, Q.C., and *Philbrick*, in support of the rule. This question, which was left undecided in *Re Palmer and the London and South Western Ry. Co.* (1), is undoubtedly one of considerable difficulty; but the company will find their way out of the difficulty if this injunction is granted. The complaint is that the vans of the complainant are arbitrarily refused admittance into the goods station of the company after a fixed hour, viz. 6.30 P.M., while those belonging to the company are allowed to enter an hour and a half or two hours later, so that persons who would or might otherwise employ the complainant or other independent carriers to carry their goods, are obliged, in order to obtain the advantage of dispatch the same night, to send them to the company's receiving-offices. It is not denied that that is the true state of things, and that it operates a prejudice or disadvantage to the complainant; but it is sought to justify the practice by a suggestion that it is for the convenience of the public, and therefore not an undue or unreasonable preference by the company of their own traffic; and for this reliance has been placed upon some loose expressions in the case of *Re Beadell and Eastern Counties Ry. Co.* (2), which were altogether unnecessary to the decision; there were abundant reasons for refusing the rule in that case without resorting to that particular one. The object of the statute 17 & 18 Vict. c. 31, so far as this point is concerned, was, to prevent monopolies and to protect individuals. It was passed in order to cure the defects which had been found in the 8 & 9 Vict. c. 20, s. 90. This Court constantly affords a remedy in cases where the public could be no sufferers by the thing complained of. Cockburn, C.J., in *Garton* v. *Bristol and Exeter Ry. Co.* (3), says: "It is enough for the complainants to say that the company are giving an advantage to A. which they withhold from them." And in *Attorney-General* v. *Great Northern Ry. Co.* (4), Kindersley, V.C., says: "The Act of Parliament was meant to provide for a case of this sort. It may

(1) Law Rep. 1 C. P. 588.

(2) 2 C. B. (N.S.) 509; 26 L. J. (C.P.) 250.

(3) 6 C. B. (N.S.) 648.

(4) 29 L. J. (Ch.) 794, 801; also reported, 1 Dr. & S. 154.

be that a railway company, acting as carriers, may favour some individuals to the detriment of others, and so give a preference to dealers in a particular article. The object of the Act was to prevent that. Now, it is clear that the grievance which this Act was intended to prevent was, where a certain individual was suffering detriment by reason of the company not acting impartially between that individual and some other person, or it might happen between two companies. But it must be a case of private mischief arising from partiality on the part of the railway with respect to the carriage of the goods of those individuals." The judgment of Cockburn, C.J., in *Re Baxendale and Great Western Ry. Co., Reading Case* (1), is to the same effect; as also are the cases of *Re Ransome and Eastern Counties Ry. Co.* (2), *Re Harris and Cockermouth and Workington Ry. Co.* (3), and *Re Nicholson and Great Western Ry. Co.* (4) The motive for the preference which some of the cases have held to be justifiable must be found in the nature of the traffic itself. This is further illustrated by the cases of *Re Cooper and London and South Western Ry. Co.* (5), and *Re Baxendale and Great Western Ry. Co., Bristol Case.* (6) An attempt has also been made to shew that the conduct complained of is exceptional or accidental only. If so, it cannot be the convenience of the public that is consulted. But the affidavits filed on the part of the complainant conclusively shew that what he complains of is not exceptional, but is of every day's occurrence, and the result of a systematic design on the part of the company to monopolise the whole carriage of goods, in direct contravention of the statute.

[MONTAGUE SMITH, J. Public convenience, no doubt, is an element to be taken into account in considering what is undue or unreasonable; but public convenience is not to be regarded exclusively.]

It is impossible to read the affidavits here without coming to the conclusion that the company systematically exclude the vans of all

(1) 5 C. B. (N.S.) 336; 28 L. J. (C.P.) 81.

(2) 1 C. B. (N.S.) 437; 26 L. J. (C.P.) 91.

(3) 3 C. B. (N.S.) 693; 27 L. J. (C.P.) 162.

(4) 5 C. B. (N.S.) 366; 26 L. J. (C.P.) 89.

(5) 4 C. B. (N.S.) 738; 27 L. J. (C.P.) 324.

(6) 5 C. B. (N.S.) 309; 28 L. J. (C.P.) 69.

1871

IN RE PALMER AND LONDON BRIGHTON, &C. RAILWAY CO.

other carriers after 6.30 P.M., and admit their own; so that practically the rule they lay down for closing their gates at that hour diverts all the late and most important traffic to their own receiving-offices. In truth, they themselves create the very difficulty they rely on as constituting the exceptional case. One fallacy which lurks in the powerful argument contained in the judgment of Erle, C.J., in *Re Palmer and London and South Western Ry. Co.* (1) is the suggestion that this Act of Parliament is of a penal character. That clearly is not so; it is a highly remedial Act; one of its infinitely various objects was, to prevent the creation of monopolies by powerful bodies,—to prevent preferences of any kind which would lead to that result. The cases of *Re Ransome and Eastern Counties Ry. Co.* (2), and *Re Nicholson and Great Western Ry. Co.* (3) shew the limits within which the prohibitory words of s. 2 of the Act are to be fairly construed.

Cur. adv. vult.

Feb. 20. KEATING, J. In this case David Palmer, a carrier, complained against the London and Brighton Railway Company that they give undue and unreasonable preference to their own company in the dispatch of goods from their stations, and prayed an injunction restraining the company from further continuing such undue preference, in violation of the 17 & 18 Vict. c. 31, s. 2.

It appears that the railway company, no doubt with the object of sharing in the profits to be derived from the carriage of small parcels, have established a large number of receiving-offices in various parts of the metropolis, for the purpose of collecting such parcels by means of numerous waggons and vans; and the complainant alleges that whereas, if his waggons with goods arrive at the railway station after half-past six o'clock P.M., they are not allowed to enter, so as to forward the goods the same night, the waggons of the company are received with their goods as late as seven, half-past seven, and even later, and the goods dispatched by the trains of the same night; that this practice was and is constantly and continuously pursued; the effect of which is to induce

(1) Law Rep. 1 C. P. 588.
(2) 4 C. B. (N.S.) 135; 27 L. J. (C.P.) 166.
(3) 5 C. B. (N.S.) 366; 28 L. J. (C.P.) 89.

many of the customers of the complainant to take their goods to the company's receiving-offices in preference to his, and thus to secure for the company a monopoly of what he termed "the late traffic," inasmuch as persons wishing to send goods would naturally resort to the offices from which they could be dispatched at the latest hour. The damage thus caused to the complainant's trade would of course be obvious; and he sets forth instances of loss of custom and expense caused by a necessary resort in many cases to other and more distant railways for the dispatch of his goods.

The answer of the railway company to this complaint sets forth the system upon which they profess to conduct their business, which is the establishment of the hour of half-past six P.M. as the latest hour at which goods are to be received at the station for dispatch the same night. They state this rule to be equally applicable to their own vans and carts as to those of the complainant and other carriers, and allege that any departure from the rule in their own favour was accidental and occasional only; that, in consequence of the distance of many of their receiving-offices from the station, their number, the crowded state of the streets causing stoppages, and the like, some of their waggons may have been late; but that the instances were rare, accidental, and by no means systematic. It was indeed argued in addition, on behalf of the company, that, even if the preference were systematic, yet, provided it were for the convenience of the public at large, it would be allowable; and for this position the judgment of Erle, C.J., in the case of *Palmer and London and South Western Ry. Co.* (1), was referred to. I do not think that the Lord Chief Justice in that case intended to lay it down that a company might create a monopoly in its own favour, to the disadvantage of the rest of the trade, even to suit the convenience of the public, but merely that, in determining what amount of departure from a general rule would be justifiable, public convenience was an element in the consideration of such a question, and that in that particular case the company were justified in what they had done. But it is enough to say, in the present case, that no such question is raised by the affidavits on the part of the company, and therefore it is not necessary to express an opinion upon it. Not only is it not stated that

(1) Law Rep. 1 C. P. 588.

1871

IN RE PALMER AND LONDON, BRIGHTON, &C. RAILWAY CO.

a systematic admission of their own vans, to the exclusion of those of other carriers, would be for the benefit of the public; but they deny that any such has taken place, and, on the contrary, they allege that the system upon which they carry on their business, and which must be taken, as against them, to be that best suited to the convenience of the public, is an impartial adherence to the rule that all goods must arrive at the station not later than half-past six o'clock, whilst the exceptions in their own favour have been infrequent and accidental. And, if such were clearly established to have been the case, in my opinion this Court ought not to interfere; nor, indeed, did Mr. Lloyd, who argued for the complainant, contend otherwise. The question, therefore, really is, whether the company by their affidavits have made out their allegation in answer to the strong case made by the complainant: and I think they have not. No matter of fact stated by the complainant is denied: and, although the statements on the part of the company as to some of the occasions referred to are probably accurate, yet I entertain no doubt, looking to the affidavits on both sides, that what may possibly have originated in accident has now grown into a system, and that the complainant has good ground for seeking the protection of this Court.

I am therefore of opinion that the rule should be made absolute, and with costs, as the present case is very similar to the cases already decided, of *Garton* v. *Bristol and Exeter Ry. Co.* (1) and *Baxendale* v. *Great Western Ry. Co.* (2), and quite in accordance with the principle prescribed by the legislature, and followed by all the Courts.

My Brother Brett concurs in this judgment.

MONTAGUE SMITH, J. I agree with my learned Brothers that this rule should be made absolute, and upon the ground stated in my Brother Keating's judgment.

It is unnecessary to consider what the result of the application ought to have been, if it had appeared that the reasonable convenience of the public in sending late parcels could not have been satisfied, except by means of the admission of the company's own

(1) 6 C. B. (N.S.) 639; 28 L. J. (C.P.) 306.

(2) *Reading Case*, 5 C. B. (N.S.) 336; 28 L. J. (C.P.) 81.

1871

IN RE PALMER AND LONDON, BRIGHTON, &C. RAILWAY CO. LONDON.

collecting vans to the station at a later hour than those of other carriers. If it had been shewn by the company that no practicable arrangements could be made by which the convenience of the public with reference to the transport of these late parcels, and the trade interests of the other carriers, could *both* have been satisfied, and the question had been raised what in such a state of things should be done, it might have been contended, upon the reasoning of the judgment of Erle, C.J., in *Palmer and South Western Ry. Co.* (1), in which in the main I concurred, that, the convenience of the public being the primary object in railway legislation, the private interests of the carriers must, in the exceptional case of these late parcels, be subordinated to it; and that, although the necessary consequence might be to give some advantage to the company, it was not, therefore, in the words of the statute, an "undue" preference, but an advantage arising from the inevitable conditions of the traffic.

But, to raise such a question, it would, I apprehend, be required of the company to shew that their arrangements were made with a view to the necessities of the public, and that there were no practicable means by which other carriers could be included in these or similar arrangements.

I agree, however, that the affidavits in this case do not raise this question; and I refer to it only for the purpose of saying that in my view our present decision does not affect it.

Rule absolute, with costs.

Attorney for complainant: *J. T. Moss.*
Attorneys for defendants: *Baxter, Rose, Norton, & Co.*

(1) Law Rep. 1 C. P. 588.

Not affected by LIMITATION ACT, 1939, s. 3. BEAMAN *v.* A.R.T.S., LTD. [1948] 2 All E.R. 89.

1871
Feb. 13.

WILKINSON AND ANOTHER *v.* VERITY.

Statute of Limitations, 21 *Jac.* 1, *c.* 16—*Detinue*—*Bailment*—*Conversion*—*Demand and Refusal.*

Goods having been bailed by the plaintiffs to the defendant for safe custody, the defendant wrongfully sold them; and the plaintiffs, more than six years after the date of the sale, being ignorant of the fact of its having taken place, demanded the return of the goods, which the defendant refused:—

Held, in an action of detinue for the goods, that the Statute of Limitations ran from the date of the demand and refusal, and not from that of the sale, inasmuch as the plaintiffs, in such a case, though entitled if they had discovered the sale to sue immediately for a conversion of the goods, were also entitled to elect to sue upon the breach of the bailee's duty in the ordinary course by the refusal to deliver up on request.

Semble, where an action of detinue is founded upon a bare taking and withholding of the property of another without any circumstances to shew a trust for the owner, or to found an option to sue either for the wrong or for the breach of the original terms of deposit, the statute would run from the time at which the property was first wrongfully dealt with.

DECLARATION by the plaintiffs, as churchwardens of All Saints, Habergham, in the county of Lancaster, for detaining a service of silver communion plate, the property of the plaintiffs, as such churchwardens.

Plea (inter alia) the Statute of Limitations. Issue thereon.

At the trial before Mellor, J., at the Liverpool Winter Assize, the facts were as follows:—The defendant was the vicar of All Saints, Habergham. In 1859 the defendant, who had the custody of the plate in question, withdrew it from use in the church and substituted for it at first a brazen and subsequently another silver service. At the end of 1859 he sold it as old silver. The fact of the sale was not known to the churchwardens, and in 1870, the old service not reappearing in the church, a formal demand of it was made on behalf of the plaintiffs as churchwardens, which the defendant did not comply with. It was contended on these facts by the defendant that the Statute of Limitations ran from the date of the sale in 1859, and that the action was therefore barred. The learned judge ruled that the statute ran from the date of the demand and refusal, and on that ruling and the findings of the jury on the other questions in dispute in the case the verdict was entered for the plaintiffs for 29*l.* 18*s.*, the value of the service.

1871

WILKINSON v. VERITY.

A rule nisi was obtained by the defendant (inter alia) for a new trial, on the ground that the above ruling was a misdirection.

Brown, Q.C., and *Leresche*, shewed cause. The Statute of Limitations for the purposes of this action runs from the time of the demand and refusal. The defendant originally became possessor of this plate as bailee. No doubt the churchwardens, had they known of it, might have sued immediately upon the sale of the plate for the conversion. But they are also entitled to sue as for a detention arising upon the demand and refusal to redeliver. That cause of action accrued within the six years. It cannot be that the defendant can put himself in a better position by a secret conversion of the property bailed than he would be if he still remained in possession of it. It is clear law that detinue lies when the defendant has parted with the possession of the chattel detained, the gist of the action being the non-delivery when demanded: *Jones* v. *Dowle* (1); *Reeve* v. *Palmer* (2); Bro. Detinue de Biens, pl. 41.

[WILLES, J., referred to the Year Book, H. 20 Hen. 6, fo. 16, a.].

The case of *Philpott* v. *Kelley* (3), is in the plaintiffs' favour.

[They also cited *Plant* v. *Cotterill* (4); *Williams* v. *Archer* (5); *Cooper* v. *Shepherd.* (6)]

The defendant in person supported the rule. He contended that the statute ran from the date of the sale of the plate, and that consequently the action was barred.

[He cited *Burroughes* v. *Bayne.* (7)]

Cur. adv. vult.

Feb. 13. The judgment of the Court (Willes, Montague Smith, and Brett, JJ.) was delivered by

WILLES, J. This was a rule calling upon the plaintiffs to shew cause why the verdict found for them upon the trial before Mellor, J., at the Liverpool Winter Assize, should not be set aside, and a verdict entered for the defendant upon points supposed to

(1) 9 M. & W. 19.
(2) 5 C. B. (N.S.) 84, 91; 27 L. J. (C.P.) 327; 28 L. J. (C.P.) 168.
(3) 3 A. & E. 106.
(4) 5 H. & N. 430; 29 L. J. (Ex.) 198.
(5) 5 C. B. 318; 17 L. J. (C.P.) 82.
(6) 3 C. B. 266; 15 L. J. (C.P.) 237.
(7) 5 H. & N. 296; 29 L. J. (Ex.) 185.

(2 S.C. 4 Jur. N.S. 999: 5 Jur. N.S. 916

1871

WILKINSON v. VERITY.

have been reserved, or for a new trial upon the ground of misdirection and that the verdict was against the evidence.

It appears by the report of the learned judge that no point was reserved, and that he is not dissatisfied with the verdict, which turned altogether upon the credibility of a witness. There is therefore, no ground for the rule, unless the alleged misdirection be made out; and we took time to consider that point only.

The action was one of detinue by churchwardens against the incumbent for detaining a service of silver communion plate. The plate was taken possession of by the incumbent before the year 1859, under circumstances in which, upon the finding of the jury, the just inference is that he was allowed to do so, not as his own, but for safe custody, and therefore under an implied stipulation that it was to be forthcoming for the use of the parish when required. Whether for peace sake, or from neglect of the duties of the plaintiffs' predecessors, the defendant was allowed to retain it, and he supplied its place at first by a brazen service, and afterwards by another silver service purchased by himself. The plaintiffs, being minded to recover the custody of the parish plate, recently before action demanded it of the defendant, and he declined to return it, alleging that it was his own, purchased for him and his successors, and not for the parish,—a plea negatived by the verdict, and which, if successful, would tend to defeat the admitted object of the donors, namely, that, whoever were the holders of the plate, it should be for the use of the parish; because the incumbent, as such, being only a corporation sole, could not without statute or custom take chattels by succession: *Howley* v. *Knight.* (1)

Upon this refusal to deliver up the plate, the plaintiffs brought this action, founded upon the established rule of law that churchwardens have succession as representing the parish in respect of its moveable property, and may maintain actions in such capacity even against the incumbent: Year Book, M. 11 Hen. 4, fo. 12, a.; Com. Dig. Esglise (F. 3); *Turner* v. *Baynes.* (2)

The defendant pleaded, amongst other pleas, the Statute of Limitations,—that the cause of action had not accrued within six years. At the trial, he gave evidence that, in the year 1859, more than six years before action, he had sold the plate out and out as old

(1) 14 Q. B. 240; 19 L. J. (Q.B.) 3. (2) 2 H. Bl. 559.

silver; and he insisted that the action was therefore barred by the Statute of Limitations, 21 Jac. 1, c. 16.

The learned judge ruled that the statute ran, or, in other words, that a fresh and substantive cause of action in detinue, as upon a bailment determined, accrued to the churchwardens upon the demand and refusal to deliver up the plate, notwithstanding the previous unknown conversion thereof by the defendant to his own use more than six years before action; and the question is whether that ruling can be sustained.

The authorities upon the construction of the statute are collected in a very useful book, Darby and Bosanquet on the Statute of Limitations, p. 28, from which it appears that the point is in this instance new; and we must decide it upon reason.

For the defendant it was urged that a complete cause of action arose against him upon the sale in 1859, that the statute thereupon began to run, and that the ignorance of the plaintiffs could not avail to stay the operation of the statute in a court of law; and, if this had been an action for damages for the conversion of the plate, in which the demand and refusal would have been only evidence of a conversion, it would have been impossible to contend that the date of the conversion could be excluded, or to deny that the defence upon the statute was sustained. Nor could the ignorance of the plaintiffs or their predecessors have prevented its operation.

It is a general rule that, where there has once been a complete cause of action arising out of contract or tort, the statute begins to run, and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded. As, for instance, in the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment.

The rule that a cause of action arises once for all upon the first default is, however, not universal; for, in cases where a man undertakes to do an act upon a future day, and before the day arrives disables himself from performing the act, or positively and absolutely refuses to be bound by or perform his contract, and, so to

1871

WILKINSON v. VERITY.

speak, declares off the bargain himself, and absolves the opposite party, it is in the option of such party at his election to treat that conduct as of itself a violation and breach of the contract, or to insist upon holding the repudiating party liable, and sue him for non-performance when the day arrives. The misconduct of the party who acts in fraud of the bargain in such cases gives the other party thereto the election of suing either for the first violation or for non-performance at the day; and it does not furnish the wrong-doer with any answer to the latter. This principle was well maintained in *Hochster* v. *De la Tour*. (1) In delivering the judgment in that case, Lord Campbell, C.J. (2), thus stated the reason of the decision:—"It seems reasonable to allow an option to the injured party either to sue immediately or to wait till the time when the act was to be done, still holding it (the contract) as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrong-doer." The same doctrine was recognized and approved by the Court of Exchequer Chamber in *Avery* v. *Bowden*. (3)

Upon like reasoning, it seems to follow on the one hand that, where the action of detinue is founded upon a wrongful conversion of the property only, as it needs must where there is a bare taking and withholding of the property of another, without any circumstances to shew a trust for the owner or to found an option to sue either for the wrong or for the breach of the original terms, the statute would run from the time at which the property was first wrongfully dealt with. This, however, as we have already observed, is not like the present case, in which the plate was originally taken for safe custody, to be restored when required.

On the other hand, if the action of detinue is resorted to, as it may be (Com. Dig. Detinue A.), for the purpose of asserting against a person intrusted for safe custody a breach of his duty as bailee, by detention after demand, independent of any other act of conversion, such as would make him liable in an action of trover, it should seem that the owner is entitled to sue, at election, either for a wrongful parting with the property (if he discovers and can prove it), or to wait until there is a breach of the bailee's duty in

(1) 2 E. & B. 678; 22 L. J. (Q.B.) 455. 17 Jur 972

(2) 2 E. & B. at p. 691. 17 Jur 974.

(3) 6 E. & B. 953; 26 L. J. (Q.B.) 3. 3 Jur NS 239

the ordinary course by refusal to deliver up on request; and that, in the latter case, it is no answer for the bailee to say that he has by his own misconduct incapacitated himself from complying with the lawful demand of the bailor. Such is the effect of the decisions referred to in the course of the argument in *Williams* v. *Archer* (1) and *Reeve* v. *Palmer* (2); in which latter case a loss of the chattels by negligence, which though of itself it plainly gave no cause of action of trover or detinue,—*Williams* v. *Gesse* (3),—yet did give cause of a special action for negligence, at the option of the owner, was held to be no answer to an action of detinue founded upon a subsequent demand and refusal, which were held to constitute a substantive cause of action, notwithstanding that the property had before the demand ceased to be in the possession of the bailee. In that case, the principle that a man intrusted with property for safe custody cannot better his position by wrongfully parting with possession of it, but must be answerable as if he retained the possession, was applied both in this Court and in the Exchequer Chamber to the action of detinue. And this is agreeable to the maxim, "Qui dolo desiit possidere pro possidente damnatur."

The learned judge's direction was therefore unobjectionable, and the rule ought to be discharged.

Rule discharged.

Attorneys for plaintiffs: *Shaw & Tremellen, for Handsley & Artindale, Burnley.*

(1) 5 C. B. 318; 17 L. J. (C.P.) 82.
(2) 5 C. B. (N.S.) 84, 91; 27 L. J. (C.P.) 327; 28 L. J. (C.P.) 168.
(3) 3 Bing. N. C. 849.

(2 Sc 4 Jur NS 929: 5 Jur NS 916

1871
Jan. 31.

IN THE MATTER OF AN ARBITRATION BETWEEN MESSRS. ROUSE & Co. AND MESSRS. MEIER & Co.

Arbitration—Revocation of Submission—9 & 10 *Wm.* 3, *c.* 15—3 & 4 *Wm.* 4, *c.* 42, *s.* 39—17 & 18 *Vict. c.* 125, *ss.* 7, 17.

An arbitration clause in a mercantile contract made no provision for making the submission a rule of court. A dispute arising out of the contract having been referred, one of the parties, professing to act under s. 17 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), made the submission a rule of court. No action was pending:—

Held (Bovill, C.J., dissenting), that the submission, not being within either 9 & 10 Wm. 3, c. 15, nor 3 & 4 Wm. 4, c. 42, s. 39, there was nothing in ss. 7 or 17 of the Common Law Procedure Act, 1854, to authorize the Court to grant leave to revoke, but that it was competent to either party to revoke without such leave.

ON the 16th of June, 1870, Messrs. R. J. Rouse & Co. entered into a contract with Messrs. Meier & Co. for the sale to the latter of 250 bales of Tinnevelly cotton. One of the conditions of the contract was, that "in the event of any dispute arising out of this contract, every such dispute shall be referred, with all usual powers, to two disinterested cotton-brokers (or their umpire) for arbitration, buyer and seller each nominating one." The cotton was duly tendered to the buyers, but they refused to accept or to pay for it, and declined to proceed to arbitration.

Amongst the printed rules of "The London Cotton-Brokers' Association" (subject to which the contract was made) is the following: "That the original selling broker, on giving notice that samples are ready for inspection, shall also inform the buyer that, unless an arbitration be demanded within five days, inclusive of the day of notice, he will call upon the president or vice-president of the association to appoint an arbitrator to act for the buyer, and that the arbitration so held shall be binding unless appealed against as provided for in the contract."

Messrs. Rouse & Co., under the above rule, applied to the vice-president of the association to appoint an arbitrator on behalf of Meier & Co.; and he appointed a Mr. Finlay,—Mr. Pasteur, another cot on-broker, being named as arbitrator on behalf of the sellers. The arbitrators so appointed made their award on the 7th of December, 1870, finding that the sellers had fulfilled the terms of

the contract, and that the buyers were bound to accept and take delivery of and pay for the cotton.

Meier & Co. declining to fulfil the award, and contending that the appointment of Finlay as arbitrator on their behalf did not bind them, the contract was made a rule of court, and notices were served upon Meier & Co. pursuant to the provisions of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), requiring them to appoint an arbitrator. Messrs. Meier & Co. thereupon appointed a Mr. Gray as their arbitrator, the sellers having appointed a Mr. Peavey. The last-mentioned arbitrators met on the 27th of December, 1870, but were unable to agree, and they thereupon referred the matter to a professional umpire.

Rouse & Co. protested against this proceeding, on the grounds that the matter in dispute could only be settled according to the terms of the contract, that is to say, "by two disinterested London cotton-brokers or their umpire," which, by the custom of the trade, meant a London cotton-broker; and that the question in dispute was one which could only be settled by persons acquainted with certain technicalities and usages of the trade, which no lawyer could be.

E. Jones, on behalf of Rouse & Co., obtained a rule calling upon Meier & Co. to shew cause why the submission to arbitration entered into between the parties should not be revoked, unless Meier & Co. would agree to leave the costs in the discretion of the umpire, on the ground that the appointment of the umpire was not a proper appointment under the submission.

Talfourd Salter shewed cause. This rule was obtained under the supposed sanction of 3 & 4 Wm. 4, c. 42, s. 39; but, to bring a case within that section, there must be an appointment of an arbitrator or umpire "by or in pursuance of a rule of Court *in an action*," or "by or in pursuance of a submission containing an agreement that the submission shall be made a rule of Court." This is not a case falling within either alternative. And there is nothing in s. 17 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), to prevent the revocation of the authority of the umpire: *Mills* v. *Bayley*. (1) *Re Drury and Lyne* (2)

(1) 2 H. & C. 36; 32 L. J. (Ex.) 179.

(2) 38 L. J. (Ch.) 278.

9 Jur. N.S. 499

1871

RE ROUSE AND MEIER.

is to the same effect. There is, therefore, no pretence for this motion.

E. Jones, in support of the rule. The submission having been made a rule of court before the appointment of the arbitrators, Rouse & Co. were bound to come to the Court to ask for leave to revoke it. Once made a rule of court, the parties no longer have any control over the matter. This distinguishes the cases of *Mills* v. *Bayley* (1) and *Re Drury and Lyne* (2) from the present. Sect. 7 of the Common Law Procedure Act, 1854, which provides that "the proceedings upon any such arbitration as aforesaid shall, except otherwise directed hereby, or by the submission or document authorizing the reference, be conducted in like manner, and subject to the same rules and enactments as to the power of the arbitrator or of the Court, &c., as upon a reference made by consent under a rule of court or judge's order," gives the Court complete control over every arbitration.

[MONTAGUE SMITH, J. Is not that section confined to compulsory references?]

The 8th section, which contains similar words, has been held to extend to ordinary references: *Re Morris and Morris.* (3) Sect. 17 provides "that every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of court." Once made a rule of court, practically the submission is at an end. Messrs. Rouse & Co. were, therefore, right in coming to the Court for leave to revoke. *Morgan* v. *Tarte* (4) is not unlike the present case.

[WILLES, J. That was a reference in an action.

Alder v. *Park* (5) was the case of a reference in an action, and therefore within 3 & 4 Wm. 4, c. 42, s. 39. The question here is, whether in a case not strictly within that section, which

(1) 2 H. & C. 36; 32 L. J. (Ex.) 179.
(2) 38 L. J. (Ch.) 278.
(3) 6 E. & B. 383; 25 L. J. (Q.B.) 261.
(4) 11 Ex. 82.
(5) 5 Dowl. 16.

is not confined to orders of reference in actions brought, but extends to and includes every case of a reference under a rule of court or judge's order, either party has power to revoke the submission after it has been made a rule of court.

BOVILL, C.J. The submission in this case did not come within the statute 9 & 10 Wm. 3, c. 15, and could not have been made a rule of court under that statute, because there was no agreement between the parties to that effect. The submission was made a rule of court under s. 17 of the Common Law Procedure Act, 1854. It stands, therefore, as a reference under that statute; and the question is whether the Court has any jurisdiction to authorize the revocation of such submission. Where a submission to arbitration was entered into under 9 & 10 Wm. 3, c. 15, and had been made a rule of court, it was still perfectly competent to either party to revoke the submission, though he was liable to be attached for so doing. The Act of Parliament which first prohibited revocation was 3 & 4 Wm. 4, c. 42, s. 39. That section provides that "the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court or judge's order, or order of nisi prius, in any action brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of His Majesty's courts of record, shall not be revocable by any party to such reference, without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge." It was contended in the first instance that that section applied to the present case, and was not confined to orders of reference in actions brought, but extended to every case where the submission was made a rule of court. Upon looking, however, at the terms of that section, I am clearly of opinion that it does not by itself apply to this case, this not being a reference in an action. We then come to the 17th section of the Common Law Procedure Act, 1854, which enacts that every agreement or submission to arbitration by consent, whether by deed or instrument in writing not under seal, may be made a rule of any one of the superior courts of law or equity at Westminster, on the application of any party thereto, unless such agreement or submission contain

1871

RE ROUSE AND MEIER.

words purporting that the parties to such agreement or submission intend that it should not be made a rule of court. That section does not carry the case any further, and does not incorporate the provisions of 3 & 4 Wm. 4, c. 42, s. 39. But in the same Act is contained a very important section which has been relied on by Mr. Jones, viz. s. 7, which raises the real and substantial question in this case. It enacts that the proceedings upon any such arbitration as aforesaid shall be conducted in like manner and subject to the same rules and enactments as *to the power of the arbitrator and of the Court*, the attendance of witnesses, the production of documents, enforcing or setting aside the award, or otherwise, as upon a reference made by consent under a rule of court or judge's order. In the case of *Mills* v. *Bayley* (1) it was no doubt held that, notwithstanding 17 & 18 Vict. c. 125, s. 17, the submission in a case similar to this might be revoked. If I had found that s. 7 had been considered in that case, I should have felt myself bound to act upon that decision. But it does not appear to have been referred to. At first sight, s. 7 would seem to refer to compulsory references only; but there has been a decision upon s. 8, viz. the case of *Re Morris and Morris* (2), which shews that s. 7 has a wider application. The first doubt arises upon the words "the proceedings upon any such arbitration." It appears clearly to me that those words are used in a much larger sense than proceedings before the arbitrator, for, the subsequent words speak of proceedings "to set aside the award, and otherwise." Where the reference had taken place under a rule of court or a judge's order, the submission could not be revoked by reason of 3 & 4 Wm. 4, c. 42, s. 39. That was an enactment affecting *the power of the arbitrator;* and it equally affected *the power of the Court.* It seems to me, therefore, looking at the whole section, that section 7 makes s. 17 of 17 & 18 Vict. c. 125, and also s. 39 of 3 & 4 Wm. 4, c. 42, applicable to arbitrations such as the present; and consequently that the parties had no power, after the submission had been made a rule of court, to revoke it without the leave of the Court. I come to the conclusion, therefore,—though with considerable hesitation, seeing that the rest of the Court entertain a different opinion—that this submission could not be revoked without the leave of the Court, and that the

(1) 2 H. & C. 36; 32 L.J. (Ex.) 179. (2) 6 E. & B. 383; 25 L.J. (Q.B.) 261.

applicant was right in coming to ask the leave of the Court to revoke the submission. It is unnecessary under the circumstances to consider the grounds upon which the Court would exercise its discretion.

WILLES, J. I am of opinion that this rule should be discharged. Before the passing of 9 & 10 Wm. 3, c. 15, it was competent to either party to a reference to revoke his submission; and it was not competent to either to make the submission irrevocable, any more than it was competent to him to make irrevocable an appointment of an ordinary agent without an interest, or to a tenant by covenant in a lease to barter away his right to replevy; for, as is said in *Vynior's Case* (1), "my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable." That law, as to arbitrations, was never questioned; and it is explained how an arbitrator was put upon the footing of an agent by a passage in Coke's Institute, where it is said that it is a good cause of challenge to a juror that he has been appointed arbitrator. In the course of time it was thought desirable that submissions to arbitration should be irrevocable. The 9 & 10 Wm. 3, c. 15, was the first but an imperfect step in that direction, making it lawful for parties entering into agreements to refer to agree that the submission shall be made a rule of court, and making it imperative on the court to make the submission a rule of court, and subjecting the party who refuses or neglects to perform the award to all the penalties of contravening a rule of court. The result was that the court in which the submission was so made a rule acquired authority over the award, and according to Lord Brougham, C., in *Nichols* v. *Roe* (2), exclusive authority over the award made under the reference. And it might be thought that it was the intention of the legislature to make the arbitrator a judge. That, however, is not the construction which was put upon the statute; because it was held, over and over again, before the passing of Baron Parke's Act, that it was competent to either party to revoke the submission, even though the submission had been made a rule of court, before an award had been made. If the revocation was after the agreement had been made a rule of court, the party revoking

(1) 8 Co. Rep. 81, b. (2) 3 My. & K. 431.

1871

RE ROUSE AND MEIER.

was guilty of a contempt, and was liable to be attached. As an authority for that, it is only necessary to refer to *Green* v. *Pole* (1), where a verdict was taken for the plaintiff at nisi prius, and an order made to refer the cause to a barrister, who was on the eve of making his award when the defendant revoked his authority. Nothing could be more objectionable; but the court held that, as the order of nisi prius had not been made a rule of court, and as the power of revocation had not been taken away by 9 & 10 Wm. 3, c. 15, the defendant was not guilty of contempt. Such was the state of the law when 3 & 4 Wm. 4, c. 42, passed. Any ambiguity which might arise whether the words in s. 39, "in any action," were intended to be limited to references under orders of nisi prius, is dispelled by the alternative "or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of court," which fills up all the species, and clearly applies to references within 9 & 10 Wm. 3, c. 15. The result is that the restriction imposed by s. 39 of 3 & 4 Wm. 4, c. 42, is a restriction imposed upon the parties that, where the reference is in pursuance of a submission which contains an agreement that it shall be made a rule of court, it shall not be revocable without the leave of the court. The question therefore is whether this agreement, not being in terms within 3 & 4 Wm. 4, c. 49, s. 39, is brought within the same category by either of the provisions of the Common Law Procedure Act, 1854. A critical examination of the clauses of that Act will shew that s. 17 was introduced with reference to a different class of arbitrations from that which the legislature was dealing with in s. 7. That section deals with references which in terms would fall within 3 & 4 Wm. 4. The 17th section superadds something, introducing references in which there is no agreement that the submission shall be made a rule of court. Taken by itself, s. 39 of Baron Parke's Act is not incorporated by s. 17 of the Common Law Procedure Act, 1854, because that section expressly incorporates the provision in 9 & 10 Wm. 3, c. 15, and consequently must be taken to exclude the operation of s. 39 of the later Act. That being so under s. 17, unless s. 7 helps the argument, there is no other section which incorporates 3 & 4 Wm. 4, c. 42, s. 39. The ques-

(1) 6 Bing. 443.

tion, therefore, is reduced to this, whether s. 7 does incorporate that provision. I am clearly of opinion that it does not. I think s. 7 refers not only to s. 6, but also to s. 5, which includes references by consent where the submission is or may be made a rule of court; and I am also of opinion that the terms of s. 5 include references under s. 17; but I think s. 7, like 9 & 10 Wm. 3, c. 15, relates to the power of the Court as to setting aside or enforcing the award, and not to the power of the parties to revoke the submission, according to the doctrine in *Vynior's Case*. (1) It simply abstains from interfering with that power. The truth, in all probability, is, that the matter escaped the attention of the framers of the Act. We, however, are bound to give the language of the Act its true grammatical construction. Sect. 7 of the Act of 1854 relates to the proceedings upon the arbitration. It is for the purpose of advancing the arbitration, not to define or declare what shall be done when the arbitration is at an end. It provides that the arbitration "shall be conducted in like manner and subject to the same rules and enactments as to the power of the arbitrator and of the Court,"—not power to revoke, but power of the arbitrator and of the Court to deal with the reference,—"the attendance of witnesses, the production of documents, enforcing or setting aside the award, or otherwise," as references by consent under a rule or order. It is a well-known rule of construction that general words in an Act of Parliament are to be limited by the special words which have preceded them. It appears to me that the language of that section plainly points to proceedings in furtherance of the arbitration, or for enforcing or setting aside the award, and was not intended to deal with the power of the parties to revoke the submission. Consequently, that power remains as it did after the passing of 3 & 4 Wm. 4, c. 42. When once the construction of a statute has been settled by a court of competent authority, it is expedient, for the sake of the suitors, that no doubt should be thrown upon it by a court of co-ordinate jurisdiction. The case of *Mills* v. *Bayley* (2) was decided in the year 1853, and it has never been questioned. It was there held that it was competent to a party, under circumstances very similar to those of the present case, to revoke his submission. The fact that the submis-

(1) 8 Co. Rep. 81. b.

(2) 2 H. & C. 36; 32 L. J. (Ex.) 179.

1871

RE ROUSE AND MEIER.

sion there had not been made a rule of court made no difference as to the right of the party to revoke, or the power of the Court, except as to the liability to an attachment for contempt under 9 & 10 Wm. 3, c. 15, if the revocation had taken place after the submission had been made a rule of court. It does not appear from the report of that case in Hurlstone & Coltman that s. 7 of the Common Law Procedure Act, 1854, was referred to; but I find in the report in the Law Journal that Mr. Cole, for the defendant, was stopped by the Court when he came to argue the point in question. Therefore, although s. 7 was not actually referred to, it must not be assumed that the Court lost sight of it, especially as two members of the Court, my Brothers Martin and Bramwell, were two of the commissioners by whom the Act of 1854 had been suggested, and must have been perfectly familiar with the subject. I cannot, therefore, doubt that they considered it, and thought s. 7 had no application; and in my opinion the conclusion arrived at in that case was properly arrived at. It seems to me that it would be legislating and not construing the statute if we were to take upon ourselves to supply the omission. I think that the rule should be discharged, but not with costs.

MONTAGUE SMITH, J. I also think this rule should be discharged; and I am very much influenced in coming to this conclusion by the case of *Mills* v. *Bayley* (1), which is a decision upon the very point now before the Court, notwithstanding s. 7 of the Common Law Procedure Act, 1854, does not appear to have been expressly alluded to there. It is plain that, where the submission is not in an action, and the agreement contains no stipulation that it shall be made a rule of court, it does not come within 3 & 4 Wm. 4, c. 42, s. 39. I also think the statutory power to make a submission a rule of court given by the 17th section of the Act of 1854 is not equivalent to the agreement of the parties to that effect, so as to bring the case within 3 & 4 Wm. 4, c. 42, s. 39. The only remaining question is, whether the case is incidentally brought within the Act of 3 & 4 Wm. 4, by the provision in s. 7 of the Act of 1854. I confess I have felt some doubt as to whether the language of the section might not be so read as to include a

(1) 2 H. & C. 36; 32 L. J. (Ex.) 179.

1871

RE ROUSE AND MEIER.

case of this kind: but, upon the whole, I think it would be straining the language of the statute to do so; and, finding the case of *Mills* v. *Bayley* (1) to be a decision exactly in point, I do not feel myself at liberty to exercise the power which Mr. Jones asks us to exercise. The words of s. 7 of the Common Law Procedure Act, 1854, seem rather to relate to the mode of conducting the proceedings before the arbitrator than to a case like this, where it is sought to restrict the common-law right of a party to revoke his submission. It would, as it seems to me, be an unwarrantable extension of the section to a case which, in my view, it was not intended to comprehend: and, upon the whole, I think it better to adhere to the cases of *Mills* v. *Bayley* (1) and *Re Drury and Lyne* (2), and to hold that, under the circumstances of this case, the Court has no statutory power to interfere.

BRETT, J. The foundation of the application for leave to revoke the submission is, that the sellers in this case were prohibited by s. 39 of 3 & 4 Wm. 4, c. 42, from revoking, and that the Court has power to grant them leave to do so. It is clear that the case is not within 9 & 10 Wm. 3, c. 15, and that the Court has no power to do what is asked, unless s. 7 of the Common Law Procedure Act, 1854, makes 3 & 4 Wm. 4, c. 42, s. 39 applicable. It is said that it does so because the leave of the Court is a proceeding in the arbitration. But the primary question is whether the prohibition to the parties is a part of a proceeding under s. 7. If not, it is clear that the Court cannot authorize one of them to do that which he has a right to do without the leave of the Court. The matter to be determined, therefore, is, what is the meaning of s. 7. That was decided by the Court of Exchequer in *Mills* v. *Bayley* (1). It is urged, indeed, that s. 7 of the Act of 1854 was not brought to the attention of the Court in that case. I cannot assume that it was overlooked by them; and, consequently, I feel bound by that decision. Had it been otherwise, I should have been inclined to hold that the whole of s. 7 was governed by the words with which it commences, "the proceedings upon an arbitration," which do not seem to me to embrace a revocation of the submis-

(1) 2 H. & C. 36; 32 L. J. (Ex.) 179.
(2) 38 L. J. (Ch.) 278.

1871

RE ROUSE AND MEIER.

sion. Without overruling that case, we cannot come to the conclusion to which we are invited by Mr. Jones.

Rule discharged, without costs.

Attorney for Rouse & Co.: *W. A. Crump.*
Attorney for Meier & Co.: *W. Overton.*

[IN THE EXCHEQUER CHAMBER.]

Feb. 6.

THE BANK OF HINDUSTAN, CHINA, AND JAPAN, LIMITED, *v.* ALISON.

Banking Company—Amalgamation—Increase of Capital—Action for Calls—Estoppel by Conduct—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 12, 50, 51.

Two incorporated banking companies, the Bank of Hindustan and the Imperial Bank of China (under the powers contained in their respective articles of association), agreed to amalgamate, the business of the latter company being transferred to the former, and the shareholders in the Imperial Bank of China having the option of taking newly-created shares in the Bank of Hindustan at a premium, part of which was to be paid out of the funds of the Imperial Bank. The directors of the Bank of Hindustan, without pursuing the course pointed out by the Companies Act, 1862 (25 & 26 Vict. c. 89), ss. 12, 50, 51, but by a simple resolution passed at one meeting and confirmed at a subsequent meeting, resolved to create and issue 20,000 new shares of 100*l.* each, for the purpose of carrying out the proposed amalgamation; their power to increase their capital under the articles of association having already been exhausted. They then issued circulars informing the shareholders in the Imperial Bank of the arrangement which had been made, and intimating to them that they had an option to take such new shares on the terms specified. The defendant, a shareholder in the Imperial Bank, in consequence, in 1864 applied for and obtained an allotment of shares, paid a portion of the deposit and premium thereon, and by his letter of application engaged to pay the residue on a given day. Calls were afterwards made, of which the defendant had notice; but he never repudiated his liability until an action was brought against him in 1867 for non-payment of those calls. In 1868 the supposed amalgamation of the two banks was by a decree of a vice-chancellor, in a suit by dissentient shareholders in the Imperial Bank, declared void:—

Held, by the Exchequer Chamber,—affirming the decision of the Court of Common Pleas,—that the directors of the Bank of Hindustan had no power to issue the new shares, and that the defendant was not by any acquiescence or conduct on his part estopped from denying that he was a shareholder in the Bank of Hindustan.

ERROR upon a judgment of the Court of Common Pleas. (1)

(1) Ante, p. 54.

Philbrick (*J. Brown, Q.C.*, with him), for the plaintiffs, argued substantially as was argued in the court below, viz. that, notwithstanding the decision of Giffard, V.C., in *Imperial Bank of China* v. *Bank of Hindustan* (1), the shares in question were properly created; that the defendant, having elected to take shares, became liable to calls as a shareholder in the Bank of Hindustan; and that, at all events, he had by his conduct as disclosed in the case estopped himself from denying his liability. As to the first point, reliance was placed on art. 101, cl. 12, of the articles of association of the Bank of Hindustan (2), and s. 12 of the Companies Act, 1862, 25 & 26 Vict. c. 89: and upon the last point the following cases were referred to: *Cheltenham and Great Western Union Ry. Co.* v. *Daniel* (3); *Sheffield and Manchester Ry. Co.* v. *Woodcock* (4); *West Cornwall Ry. Co.* v. *Mowatt* (5); *Oakes* v. *Turquand* (6); *Hull Flax and Cotton Mill Co.* v. *Wellesley* (7); *In re New Zealand Banking Corporation, Sewell's Case* (8); *Clarke* v. *Dickson.* (9)

[KELLY, C.B. If these shares never had any lawful existence, the question of estoppel could not arise.]

H. Lloyd, Q.C. (*Eyre Lloyd* with him), for the defendant, contended that, the amalgamation having been set aside, the whole transaction founded thereon fell with it; and that, having already exhausted their powers of increasing their capital, the directors of the Bank of Hindustan could not lawfully create the additional shares they affected to create, without having first altered their articles of association in the manner directed by ss. 12, 50, and 51 of the Companies Act, 1862: *Re West India and Pacific Steam Shipping Co.* (10) *In re London and Northern Insurance Corporation, Stace and Worth's Case* (11), was referred to, and the cases cited for the plaintiffs observed upon.

Philbrick, in reply.

(1) Law Rep. 6 Eq. 91.
(2) Ante, p. 54.
(3) 2 Q. B. 281.
(4) 7 M. & W. 574.
(5) 15 Q. B. 521; 19 L. J. (Q.B.) 478.
(6) Law Rep. 2 H. L. 325.
(7) 6 H. & N. 38; 30 L. J. (Ex.) 5.
(8) Law Rep. 3 Ch. 131.
(9) E. B. & E. 148; 27 L. J. (Q.B.) 223.
(10) W. N. 1868, p. 112, a decision upon s. 9 of the Companies Act, 1867 (30 & 31 Vict. c. 131), the words of which are the same as those of s. 12 of the Companies Act, 1862.
(11) Law Rep. 4 Ch. 682.

1871

BANK OF HINDUSTAN v. ALISON.

KELLY, C.B. We are all of opinion that the judgment of the Court of Common Pleas should be affirmed. The facts which bear upon the great question in the case lie in a very narrow compass. Two banking companies, each of whom was carrying on business under articles of association, entered into an agreement the substance and effect of which was that the one, the Imperial Bank of China, transferred its business to the other, the Bank of Hindustan, in consideration of 20,000 shares in the Bank of Hindustan. It was in truth a purchase and sale of the property of the one bank to the other; and under it, if it had been a valid agreement, the Imperial Bank collectively, and each of its shareholders individually, would have parted with all their share and interest in the property and effects of that company, and nothing would have remained to that bank or to any of its shareholders; and the Bank of Hindustan would have acquired the whole undertaking of the Imperial Bank, and would have been under an obligation to transfer and deliver to the shareholders in that bank the stipulated number of shares in the capital of their concern. I do not enter into the minor particulars of the bargain, such as the premium at which the shares were to be taken, and so forth: I take the substance of the transaction to have been the sale and transfer of the business on the one hand, and the payment of the price in shares on the other: and, if the agreement had been valid, the mode of carrying it into effect would have been simple in the extreme; the shareholders in the Imperial Bank would have received shares in the Bank of Hindustan, and would have been duly registered as shareholders in respect thereof. But it appears that the validity of the agreement was contested in a court of equity by certain of the non-assenting shareholders (of whom this defendant was not one), and it was held to be a void agreement, and was set aside. Now, what was the effect of this decision, independently of the particular circumstances? The Imperial Bank had ceased to exist, and the Bank of Hindustan was bound under the agreement forthwith to create and grant and transfer to the holders of shares in the Imperial Bank an equal number of shares in the Bank of Hindustan. But, in the first place, as soon as the agreement was set aside, what authority had the governing body, the directors, of the Bank of Hindustan to part with any of the shares, assuming them

1871

BANK OF HINDUSTAN v. ALISON.

to have been duly created? They had no more right to part with shares for which they could receive no benefit than they would have had to part with so much money of the bank without consideration. So that, if the matter had rested there, it is perfectly clear that the Bank of Hindustan could not have lawfully delivered over these shares, and any one of their shareholders might have obtained an injunction to restrain them from so doing. The consequence is that the bank had no power to grant or allot these shares to the defendant, and the defendant took nothing by the allotment. But, when we come to look at what the transaction really was between the parties as to the granting and acceptance of these shares, it is clear beyond a doubt that all that was done was done in pursuance and upon the faith of the agreement of amalgamation, and therefore, when it turned out that that agreement was void, it follows that all that was done under it became void also, and conferred no right or obligation on either party. If the defendant had received certificates for shares, or even if he had received dividends, he would have been bound to return them.

Let us see what the transaction really was. The secretary of the Bank of Hindustan writes to the defendant as follows:—"In right of your being a registered holder of shares in the Imperial Bank of China, you are entitled, under the terms of arrangement entered into between the two companies, to an allotment of a like number of shares in this company;" and the defendant is requested to sign a form inclosed. What is that but a representation to the defendant that an agreement has been entered into under which he is entitled to receive certain shares, and an invitation to him to become a holder of shares expressly under the terms of that agreement? If that agreement was void, nothing that was done under it could have any force or validity. What did the defendant do which is now said to have made him a shareholder in the Bank of Hindustan, and to prevent him from remitting himself back to his original position? He writes:—"As a registered holder of shares in the Imperial Bank of China, I hereby claim the privilege I am entitled to of becoming a shareholder in the Bank of Hindustan to the extent of the same number of shares I hold in such bank; and I authorize you to place my name upon the register of members of your company for the same." What is that but saying,—

1871

BANK OF HINDUSTAN v. ALISON.

"By virtue of the agreement, which you tell me is a valid agreement, I elect to claim the privilege to which I am entitled under it?" Whatever else took place between the parties is upon the same footing; the whole was based upon the assumption that the agreement was valid, and that the shares were valid shares, which the bank was bound to deliver and the defendant bound to accept.

I do not refer to the ground upon which the agreement of amalgamation was declared to be void. It was set aside. I feel bound to observe, in addition to the ground taken by Giffard, V.C., that these 20,000 new shares were never lawfully created at all. The original limit of the capital of the Bank of Hindustan, under its articles of association, was 1,000,000*l.*, in 10,000 shares of 100*l.* each, with power to increase it to 2,000,000*l.* by the issue of 10,000 more shares of the same nominal value,—a power which had been exercised before the agreement of amalgamation was entered into. In consequence of that agreement, notice was given of a meeting of the shareholders of the Bank of Hindustan to be held on the 15th of August, 1864, and at that meeting a resolution was passed for the creation of 20,000 new shares of 100*l.* each; and that resolution was confirmed at a subsequent meeting held on the 12th of September. By this means the capital of the bank was increased to 4,000,000*l.* When we look at the articles of association, we find that the bank had no power to increase its capital in this manner. It is said that s. 12 of the Companies Act, 1862 (25 & 26 Vict. c. 89), gave them this power. That clause is as follows:—"Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by resolution in manner hereinafter (ss. 50, 51) mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient," &c. The true construction of that section is, that the company may, by adopting the course pointed out in ss. 50 and 51,—viz. by special resolution passed at a general meeting of the shareholders, confirmed at a subsequent general meeting, alter any of the regulations contained in the articles of association, and so introduce therein new and additional powers, under which it may be lawful for the directors to increase the amount of capital and the number of shares. Instead, however, of adopting

that course here, the directors have sought, by means of a single resolution passed at one meeting, and confirmed at a subsequent meeting, to alter the articles of association, and to authorize the creation of additional capital by the issue of new and additional shares. It appears to us that it was not competent to them to do this. Independently, therefore, of the shares having been issued under an arrangement which was void, they never were lawfully brought into existence, and consequently the defendant did not become a shareholder in the plaintiffs' bank.

The question of estoppel was disposed of in the course of the argument. A party is only estopped from shewing the truth where he has by some act or declaration acquiesced in an assumed state of things, and by such acquiescence the situation of the other party has been altered to his prejudice. For example, where the directors of a company have been guilty of some irregularity in the issuing of shares, and, with knowledge of the irregularity, a party has agreed to become a shareholder, or, after having been made acquainted with the irregularity, has received dividends or done some other act to express his acquiescence in what has been done, so that the situation of the directors has been altered to their prejudice, they have a right to treat him as a shareholder, and he is estopped from setting up the irregularity by way of defence.

I would only further remark upon the minute at the end of the case before Giffard, V.C.,—that inquiry should be made what shareholders in the plaintiffs' company (the Imperial Bank of China) had accepted shares in the defendants' company (the Bank of Hindustan), and that it should be declared that the defendants' company were entitled to stand in the place of such shareholders in the distribution of the assets of the plaintiffs' company in the winding-up,—I should presume that it had been thrown out in argument that some of the shareholders in the Imperial Bank had accepted and treated as their own shares in the Bank of Hindustan, and, without its having been suggested that there was any doubt as to the lawfulness of the shares, it was thought that, if there were such contracts which had been fully carried out, there might arise some liability under them, and that the matter was a proper one for inquiry. If these additional shares in the Bank of Hindustan had been lawfully created, and any of the

1871

BANK OF HINDUSTAN v. ALISON.

shareholders in the Imperial Bank had so contracted or had so conducted themselves as to make any of the shares vest in them, such an inquiry would have been most proper. But the fact turns out to be otherwise. It may further be observed, that the present defendant was not a party to that suit.

It appears to us, therefore, that the agreement for amalgamation, which was the whole foundation of the transaction, having failed, the transaction itself wholly failed, and the defendant never became a shareholder in the Bank of Hindustan, and that the judgment of the Court of Common Pleas should be affirmed.

Mellor, J., Channell, B., Lush, J., and Cleasby, B., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Ashurst, Morris, & Co.*
Attorney for defendant: *A. Pulbrook.*

Jan. 30.

ELLIS *v.* M'HENRY.
ELLIS AND ANOTHER *v.* M'HENRY.

Debtor and Creditor—Bankruptcy—Composition Deed—Lex Loci contractus—Colonial Courts—Estoppel.

3 PC 508
4 D. 511
CLD 666

The English bankruptcy law is binding upon the colonies, and an English composition deed, containing a covenant not to sue, may be pleaded to an action on a Canadian debt in a Canadian court.

Therefore, in an action on a Canadian judgment, founded on a contract made and to be performed in Canada, the defendant cannot set up a composition deed made in England before the judgment in Canada.

The English courts are bound by the provisions of the English bankruptcy law in actions on foreign and colonial as well as English debts.

Therefore, if a creditor in respect of a contract made and to be performed abroad sues in an English court, an English composition deed containing a covenant not to sue, is a good answer to the action.

A covenant in a composition deed that the creditors will not sue for their debts and that, if they do, the deed may be pleaded as an accord and satisfaction, and in bar of the suit or other proceeding, does not make the creditors who sue, and against whom the deed is set up, forfeit their debt or lose their right to their dividends, and does not render the deed void.

In the first action, the first count was on a judgment obtained by the plaintiff against the defendant in the Court of Queen's Bench for Upper Canada.

The second plea set up a composition deed made by the plaintiff at a date prior to the judgment, but after the accruing of the causes of action in respect of which the judgment was obtained. The deed provided for the payment by the debtor under inspection of his debts, by instalments extending over six years, and for his giving to his creditors in the meantime debentures of the Atlantic and Great Western Railway Company to the amount of their debts; and in the 7th clause it provided as follows:—"That the creditors respectively (but without prejudice to any rights, powers, liens, or securities which they respectively, or the inspectors may now already possess, or shall be entitled to by virtue of these presents), will not (unless default be made by the debtor in the punctual payment of the said sum of 6*s.* 8*d.* in the pound, or of any of the said four annual instalments) during the period of six years from the date hereof, sue, arrest, prosecute, molest, summon in bankruptcy, or otherwise disturb, attack, seize, sequester, or extend the debtor or his lands, goods, chattels, credits, or estate, for or concerning any of the debts or liabilities aforesaid, and that these presents shall or may be pleaded and allowed and produced in evidence as an accord and satisfaction of such debt or liability, and in bar or discharge of all and every or any action, suit, proceeding, judgment, or execution which shall during the said period of six years (unless as aforesaid) be commenced, sued, signed or issued, or be or become enforceable or recovered or recoverable against the debtor, or his goods or estate, by or at the suit of them, the respective creditors, for the said debts or liabilities respectively, or any of them."

The second replication to the second plea alleged, by way of estoppel, that the matters contained in the plea could have been pleaded in the action in the Court of Queen's Bench for Upper Canada as a defence to that action.

The third replication to the second plea alleged that the judgment was obtained in respect of money payable by the defendant to the plaintiff under a contract between them, for the execution of works by the plaintiff for the defendant; that at the time of making the contract, and ever since, the plaintiff had been domiciled in Canada, and that the contract was made, and to be wholly performed in Canada, and the works executed and the money paid there.

1871

ELLIS v. M'HENRY.

To these replications the defendant demurred.

The second action was on the common money counts. The second plea was similar to that in the first action. The second replication to the second plea was similar to the third replication to the second plea in the former action, and to that replication the defendant demurred.

Jan. 4. *Pollock*, Q.C. (*Bompas* with him), in support of the replications, by agreement began.

The principal question is whether an English bankruptcy is any answer to an action on a colonial debt, for it can hardly be contended that the rules respecting bankruptcy and composition deeds are different. By the comity of nations the law to be followed in actions on foreign contracts is the law of the place where the contract was made, except as regards questions of procedure, Story's Conflict of Laws, § 558. Bankruptcy is not a question of procedure, but is a release of the obligation created by the contract (§ 338), and the parties must be held to have contracted with the understanding that the contract should only be released according to one of the ways provided by the laws of the country where they were contracting. In Story's Conflict of Laws, § 331, it is said: "The general rule is that a defence or discharge good by the law of the place where the contract is made, or is to be performed, is to be held of equal validity in every other place where the question may be litigated"; and in § 342, it is said the converse doctrine is equally well established, namely, that a discharge of a contract by the law of a place where the contract was not made or to be performed, will not be a discharge of it in any other country. In Kent's Commentaries, vol. ii. p. 393, a similar doctrine is laid down; and the Supreme Court of the United States, in *Ogden* v. *Saunders* (1), held that a discharge by the bankruptcy law of one state did not affect a contract made and to be performed in another; but that a discharge by the bankruptcy law of the state where the contract was made, was a discharge everywhere. Upon these principles it was held, in *Smith* v. *Buchanan* (2), that a foreign bankruptcy was no answer in England to an action on an English debt; and in *Lewis* v. *Owen* (3),

(1) 12 Wheat. 213. (2) 1 East, 6. (3) 4 B. & Ald. 654.

that an Irish bankruptcy was no answer in England to an English debt, Ireland for this purpose being a foreign country; and *Phillips* v. *Allan* (1) is a similar decision with respect to a Scotch cessio bonorum, which according to Scotch law acts as a discharge of all debts. In *Sidaway* v. *Hay* (2), it was held that a discharge under a Scotch bankrupt Act (54 Geo. 3, c. 137) was a discharge of an English debt, the statute being an imperial one, and therefore affecting English rights, except in as far as the contrary was expressed. The case is different, however, with colonies which have independent legislatures, and which are not bound by English Acts unless expressly named in them, and the Bankruptcy Acts do not extend to them. This was so laid down by Lord Mansfield in *Cleve* v. *Mills* (3), and the same was held in *Mawdesley* v. *Parke* (4), and it is so stated in Burge's Commentaries on Colonial and Foreign Laws, vol. iii., p. 908. It is true that in the cases above cited the actions have been brought in the country where the contract was made, and not where the bankruptcy took place; but by the principles of the comity of nations above referred to, the courts of this country will not be guided in a matter affecting foreign contracts by the English law, unless it expressly appears by the Act that is relied on that they were intended to be so, and no such inference can be drawn from the words of the Bankruptcy Act. The case of *Rose* v. *M'Leod* (5), is an authority directly in point; there to an action in Scotland on a colonial contract, an English bankruptcy was pleaded, which, according to the authority of *Sidaway* v. *Hay* (2), would have been binding in the Scotch court as a discharge of a Scotch debt, but it was held to afford no answer to the action.

[KEATING, J. In *Santos* v. *Illidge* (6), it was held by a majority of the Court of Error that if an Englishman contracts with a foreigner abroad to do an act not contrary to the law of the foreign country, but contrary to the law of England, the foreigner may maintain an action in an English Court for its non-performance. This is referred to in the notes to *Mostyn* v. *Fabrigas* (7) as a startling decision.

(1) 8 B. & C. 477.
(2) 3 B. & C. 12.
(3) Cook's Bank. Law, 297.
(4) Cited 1 H. Bl. 680.
(5) 4 S. & D. 308.
(6) 8 C. B. (N.S.) 861; 29 L. J. (C.P.) 348.
(7) 1 Sm. Lead. Cas. 6th ed. 623, 662.

1871

ELLIS v. M'HENRY.

BRETT, J. In *The Halley* (1) it was held, that the suit being instituted in England, the decision must be governed by English law.]

That was a case of tort, and the rule that contracts are to be enforced according to the law of the country where they are made has never been extended to cases of tort.

[WILLES, J. It was held in *Leroux* v. *Brown* (2), that in an action here on a French contract, the defendant may avail himself of the 4th section of the Statute of Frauds.]

That section only applies to procedure, and takes away the right to enforce the debt by action; it does not make the contract void.

There is no provision in the Bankruptcy Act for giving notice of the bankruptcy to colonial creditors, and they ought not therefore in justice to be barred. If the plaintiff had availed himself of the right to come in under the composition deed, he would no doubt be bound, but a person who may prove in bankruptcy is not always bound to do so, and the right to do so is only an equivalent for the loss of the defendant's goods which are vested in the assignees. The defendant can protect himself, if necessary, by availing himself of the bankruptcy laws of the colony.

If the English Bankruptcy Act does bar all colonial debts, it must be because it is an Act of the Imperial Legislature, and then the composition deed might have been pleaded in the Canadian courts, and this is averred by the replication, and being a question of foreign law, is a question of fact, and must be taken in this argument as true; if so, it cannot be set up now as an answer to the first action, which is on the Canadian judgment: *Henderson* v. *Henderson*. (3)

The deed set up in the plea is bad, because it is unequal. It in effect provides that any creditor who sues shall lose his debt, for the deed may then be pleaded in accord and satisfaction. This is sufficient to make the deed bad. *Lyne* v. *Wyatt* (4); *Hidson* v. *Barclay*. (5) The clause, too, would prevent any creditor, whose

(1) Law Rep. 2 P. C. 193.
(2) 12 C. B. 801; 22 L. J. (C.P.) 1.
(3) 6 Q. B. 288.
(4) 18 C. B. (N.S.) 593; 34 L. J. (C.P.) 179.
(5) 3 H. & C. 361; 34 L. J. (Ex.) 217.

debt was disputed, compelling the debtor to give him the security provided by the deed.

[WILLES, J. The 7th clause applies only to the original debts, and not to rights under the deed; it is equivalent to a covenant not to sue. The case of *Gibbons* v. *Vouillon* (1) is decisive.]

Quain, Q.C. (*Beresford* with him), in support of the demurrers. The cases cited for the plaintiff only shew that a foreign bankruptcy is no bar to an action in the English courts on a contract made in any other country than that of the bankruptcy; but if a plaintiff comes into the English courts, he must accept the English law, a release under the English Bankruptcy Acts therefore will be a good answer to his claim. This is shewn by the case of *The Halley* (2) already cited by the Court.

[BRETT, J. The case of *The Amalia* (3) is to the same effect.]

The same principle was involved in the case of *Scott* v. *Lord Seymour*. (4) The words of the Bankruptcy Act are imperative, and expressly render a composition deed binding on all creditors. The Canadian Courts ought similarly to act upon Canadian law, and the defendant could not therefore have pleaded the deed there. If this is to be treated as a question of fact, the plaintiff should have averred specially in his replication that the defendant not having done so, would, according to Canadian law, prevent the defence being set up subsequently, the replication being in estoppel.

Pollock, Q.C., in reply. All the cases relied on upon the other side are actions of tort, not contract.

Cur. adv. vult.

Jan. 30. The judgment of the Court (Bovill, C.J., Willes, Keating, and Brett, JJ.) was delivered by

BOVILL, C.J. The first of these cases was an action upon a judgment recovered by the plaintiff against the defendant in the Court of Queen's Bench in Upper Canada; the original cause of action having arisen upon a contract which was made in Upper Canada, and was to be wholly performed there.

(1) 8 C. B. 483; 19 L. J. (C.P.) 74.
(2) Law Rep. 2 P. C. 193.
(3) 1 Moo. P. C. (N.S.) 471; 32 L. J. (P. M. & A.) 191.
(4) 1 H. & C. 219; in error, ibid. 231; 31 L. J. (Ex.) 457; in error, 32 L. J. (Ex.) 61.

1871

ELLIS v. M'HENRY.

The second action was not upon a judgment, but for a cause of action precisely similar to that, in respect of which the judgment in the first action had been obtained.

In each case the defendant set up a deed operating as a discharge in bankruptcy, under the English Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), which deed appears upon the pleadings to have been duly executed so as to be binding upon the creditors who had not executed it, and to have been so executed after the original cause of action in each case arose, though not after the recovery of the judgment on which the first action was brought. The principal and most material question that was argued before us was as to the effect of this discharge upon the claims in these actions.

In the first place, there is no doubt that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. It was laid down by Lord King, in *Burrows* v. *Jemino* (1); by Lord Mansfield, in *Ballantine* v. *Golding* (2); by Lord Ellenborough, in *Potter* v. *Brown* (3); by the Privy Council, in *Odwin* v. *Forbes* (4), and in *Quelin* v. *Moisson* (5); and by the Court of Queen's Bench in the case of *Gardiner* v. *Houghton* (6); and by the Court of Exchequer Chamber, in the elaborate judgment delivered by my Brother Willes, in *Phillips* v. *Eyre* (7).

Secondly, as a general proposition, it is also true that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country: *Smith* v. *Buchanan* (8); *Lewis* v. *Owen* (9); *Phillips* v. *Allan* (10); *Bartley* v. *Hodges* (11).

But, thirdly, where the discharge is created by the legislature or

(1) 2 Stra. 733.
(2) Cook's Bk. Law, 419.
(3) 5 East, 124.
(4) Buck, 57.
(5) 1 Knapp, 265, 266, n.
(6) 2 B. & S. 743.
(7) Law Rep. 6 Q. B. 1, 28.
(8) 1 East, 6.
(9) 4 B. & Ald. 654.
(10) 8 B. & C. 477.
(11) 1 B. & S. 375; 30 L. J. (Q.B.) 352.

laws of a country which has a paramount jurisdiction over another country in which the debt or liability arose, or by the legislature or laws which govern the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case, or in proceedings before the tribunal in the other case. This is only consistent with justice in the case of bankruptcy, as the debtor is thereby deprived of the whole of his property wherever it may be situate, subject to the special laws of any particular country which may be able to assert a jurisdiction over it. In the case of the legislature of the United Kingdom making laws which will be binding upon her colonies and dependencies, a discharge either in the colony or in the mother country may by the Imperial legislature be made a binding discharge in both, whether the debt or liability arose in one or the other; and a discharge created by an Act of Parliament here would clearly be binding upon the courts in this country, which would be bound to give effect to it in an action commenced in the English courts. In *Edwards* v. *Ronald* (1), it was decided that an English certificate in bankruptcy was a good answer to a debt arising in Calcutta and sued for in the Supreme Court there. In *Lynch* v. *M'Kenny* (2), a defendant who was sued in England for a debt contracted in Ireland was considered as discharged by an English certificate. In *Royal Bank of Scotland* v. *Cuthbert* (3), it was held by the Court of Session that an English certificate was a bar in the Scotch courts to a debt contracted in Scotland. And in *Sidaway* v. *Hay* (4), a discharge under a Scotch sequestration, in pursuance of an Act of the Imperial Parliament, was held to be a good answer to an action in the English courts for a debt contracted in England.

It was also laid down by Bayley, J., in *Phillips* v. *Allan* (5), that a discharge of a debt, pursuant to the provisions of an Act of Parliament of the United Kingdom, which is competent to legislate for every part of the kingdom, and to bind the rights of all persons residing either in England or Scotland, and which purported to bind subjects in England and Scotland, operated as a discharge in

(1) 1 Knapp, P. C. 259.
(2) Cited 2 H. Bl. 554.
(3) 1 Rose, 462, 486.
(4) 3 B. & C. 12.
(5) 8 B. & C. 477, 481.

1871

ELLIS v. M'HENRY.

both countries. In *Armani* v. *Castrique* (1), Pollock, C.B., says: "A foreign certificate is no answer to a demand in our courts; but an English certificate is surely a discharge as against all the world in the English courts. The goods of the bankrupt all over the world are vested in the assignees, and it would be a manifest injustice to take the property of a bankrupt in a foreign country, and then to allow a foreign creditor to come and sue him here." In the recent case of *Gill* v. *Barron* (2), the following passage occurs in the judgment of the Court, as delivered by Kelly, C.B.: "It is quite true that an adjudication in bankruptcy, followed by a certificate of discharge in this country, under the bankrupt laws passed by the Imperial legislature, has the effect of barring any debt which the bankrupt may have contracted *in any part of the world;* and it would have the effect of putting an end to any claims in the Island of Barbadoes or elsewhere to which the appellant might have been liable at the date of the adjudication." In referring to the English certificate being a discharge of debts contracted in any part of the world, the Lord Chief Baron was, of course, speaking of the effect of such certificate in a British court. The same distinction between the effect of colonial and Imperial legislation was very pointedly recognised by Wightman and Blackburn, JJ., in *Bartley* v. *Hodges* (3); see also *The Amalia*. (4)

The case of *Rose* v. *M'Leod* (5), which was relied on by the plaintiffs, at first sight seems to be opposed to these views, as it was there held that, in a suit commenced in the Scotch Courts, an English bankruptcy and certificate were not a discharge of a debt contracted in Berbice. But the only question argued and really determined was, whether the debt was to be considered as having arisen in Berbice or in England; and, the Court having decided that it was not an English debt, it was assumed that it would not be barred by an English certificate, without any question having been raised or decided upon any other point. It is pretty clear, from the statement of the law of Scotland in Bell's Commentaries, (6th ed.), p. 1300, that only the international view was presented to the Court in that case, and that the paramount effect of Impe-

(1) 13 M. & W. 443, 447.
(2) Law Rep. 2 P. C. 157, 175.
(3) 1 B. & S. 375; 30 L. J. (Q.B.) 352.
(4) 1 Moo. P. C. (N.S.) 471.
(5) 4 S. & D. 308.

rial legislation was not considered. The case of *Lewis* v. *Owen* (1), was also relied upon by the plaintiff; and it was, no doubt, there held that a certificate under an Irish bankruptcy was no discharge of a debt contracted in England; but in that case the principal question which was raised and decided was, whether the debt arose in England or in Ireland; and, it being held to have accrued in England, it was considered that the debt was not barred by the Irish certificate. The point as to the effect of Imperial legislation, however, did not arise, as the Irish bankrupt law at that time in force depended on statutes of the Irish parliament passed before the Union; and, when a similar question arose as to the effect upon an English debt of an Irish certificate obtained under the provisions of an Act of the Imperial legislature, viz., 6 & 7 Wm. 4, c. 14, it was held that the Irish certificate was a bar to the English debt: *Ferguson* v. *Spencer* (2). It was likewise held that a discharge in Scotland by a cessio bonorum under the general Scotch law, and which only *discharged the person of the debtor*, was no answer to an action brought in the English courts for recovery of a debt contracted in England, *Phillips* v. *Allan* (3); but it was considered in that case, and there is the opinion of Bayley, J., before quoted, that the decision would have been the other way, if there had been an absolute discharge created by an Act of the Imperial parliament. And in *Sidaway* v. *Hay* (4), it was expressly decided, as already mentioned, that a discharge under a Scotch sequestration, in pursuance of an Imperial statute, was a discharge in England from a debt contracted here. It has also been held that a discharge in Newfoundland, under a special Act of the Imperial parliament, was a discharge in this country of a debt contracted in England: *Philpotts* v. *Reed.* (5)

These authorities, therefore, seem to establish the third proposition, and by which this case must be governed.

There are nice distinctions which may sometimes arise where, though a contract is made in one country, it is to be performed or to take effect in another; or is made under circumstances which shew that it is intended to be subject to some law other than that

(1) 4 B. & Ald. 654.
(2) 1 M. & G. 987.
(3) 8 B. & C. 477, 481.
(4) 3 B. & C. 12.
(5) 1 B. & B. 294.

1871

ELLIS v. M'HENRY.

of the place in which it was made; *Lloyd* v. *Guibert* (1). But no such point arises in these cases, as the contracts out of which these debts arose were both made and to be performed in Upper Canada.

In the present case, the discharge obtained by the defendant in England under what is equivalent to an English bankruptcy, was created by an Act of the Imperial legislature which, like the previous Bankruptcy Acts, is of general application, and must receive a similar construction; and, by force of that statute, the deed operates as a general discharge of all debts. The discharge would, therefore, in our opinion, be binding in Canada, and it is also clearly binding and effectual as an answer to proceedings commenced in the courts of this country. The result of this would be, that the deed would operate as a discharge of the original debt in each case, and therefore be a good answer to the *second* action.

The *first* action, however, is upon a judgment which was recovered after the deed was completed. In the view which we take of this case, the deed might have been set up as a defence to the action brought in Upper Canada; and it is averred, as a matter of fact, in the third replication, and not denied, that it might have been so pleaded. The question then arises, whether it can now be brought forward in the proceedings as an answer to the judgment.

When a party having a defence omits to avail himself of it, or, having relied upon it, it is determined against him, and a judgment is thereupon given, he is not allowed afterwards to set up such matter of defence as an answer to the judgment, which is considered final and conclusive between the parties.

We are accustomed, and indeed bound, to give effect to final judgments of the courts of other countries, and of our colonies, where they possess a competent jurisdiction which has been duly exercised; and the correctness of such judgments are not allowed to be again brought into contest in our courts. The only ground on which the judgment in the first action was sought to be impeached upon the pleadings before us, was, that there was a defence to the original claim, by the discharge under the deed; but that

(1) 6 B. & S. 100; 33 L. J. (Q.B.) 241; in error, Law Rep. 1 Q. B. 115.

would go to impeach the propriety and correctness of the judgment, and is a matter which cannot be gone into after the judgment has been obtained, or in this action which is brought to enforce it; ne lites immortales essent dum litigantes mortales sunt: *Henderson* v. *Henderson* (1); *Bank of Australasia* v. *Nias* (2); *De Cosse Brissac* v. *Rathbone* (3); *Scott* v. *Pilkington* (4); *Vanquelin* v. *Bouard* (5); *Castrique* v. *Imrie* (6). If it had been sought to impeach the judgment on the ground of fraud, the case might have been different: *Earl of Bandon* v. *Becher* (7); *Philipson* v. *Earl of Egmont* (8); and the opinions of the majority of the judges in *Castrique* v. *Imrie* (6).

Upon the argument a further question was raised as to the validity of the deed itself; and it was objected that it was invalid by reason of its containing a covenant by the creditors that they would not sue for their debts, and that, if they did so, the deed might be pleaded as an accord and satisfaction, and in bar of the suit or other proceeding. The effect of that, however, is not that the creditor is to forfeit his debt and to lose his dividend under the deed, but simply to prevent any action or proceedings to recover the debt itself, leaving the right to the dividend untouched; and this, according to the authorities, does not render the deed void.

Upon these grounds, we are of opinion that our judgment should be, in the first action, in favour of the plaintiff, and in the second action in favour of the defendant.

Judgments accordingly.

Attorneys for plaintiffs: *Bischoff, Bompas, & Bischoff.*
Attorneys for defendant: *Elmslie, Forsyth, & Sedgwick.*

(1) 6 Q. B. 288.
(2) 16 Q. B. 717; 20 L. J. (Q.B.) 284.
(3) 6 H. & N. 301; 30 L. J. (Ex.) 238.
(4) 2 B. & S. 11; 31 L. J. (Q.B.) 81.
(5) 15 C. B. (N.S.) 341; 33 L. J. (C.P.) 78.
(6) Law Rep. 4 H. L. 414.
(7) 3 Cl. & F. 479.
(8) 6 Q. B. 587.

END OF HILARY TERM, 1871.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

EASTER TERM, XXXIV VICTORIA.

1871
April 20.

JEFFREY AND OTHERS *v.* NEALE.

Landlord and Tenant—Lease—Covenant to pay all Taxes and Assessments—Tithe Rent-charge.

The lessor of certain lands was, at the date of the lease, also owner of the tithe rent-charge upon such lands.

The lease contained a covenant by the lessee to pay "all taxes and assessment whatsoever for or in respect of the said demised premises, save and except the level tax, property tax, and land tax," which were to be paid by the lessor:—

Held, in an action upon the covenant by the plaintiffs, who were assignees of the reversion and of the tithe rent-charge, against the lessee for nonpayment of tithe rents, that the words "taxes and assessments" in the covenant did not include tithe rent-charge, and that the action was therefore not maintainable.

DECLARATION in substance stated that Thomas Bridger Adames being seised in fee of a messuage, &c., and land, let the same by deed to the defendant for a certain term of years, at the annual rent of 420*l.*, payable half-yearly, without any deduction or abatement on any account whatsoever, except in respect of the level tax, property tax, and land tax, which were to be paid by the said Thomas Bridger Adames; and the defendant covenanted that he would, during the said term, at his own costs, bear, pay, and

discharge all taxes and assessments whatsoever for or in respect of the said demised premises, or any part thereof, which should be taxed, charged, or assessed on the said demised premises, or any part thereof, or on the landlord in respect thereof, save and except the level tax, property tax, and land tax; and afterwards, during the term, the said Thomas Bridger Adames, by deed, granted and assigned all his reversion in the premises to the plaintiffs. Averment of performance of conditions precedent. 1st breach: That the defendant, after the assignment, and during the term, made default in paying divers charges and assessments other than the level tax, property tax, and land tax, for and in respect of the demised premises, and contrary to the covenant suffered a large amount which had been and was charged and assessed on the demised premises after the assignment, and during the term, for tithe commutation rent-charge, in lieu of tithes to be after the assignment, and at the commencement of the suit, due, in arrear and unpaid.

Plea to the 1st breach: That the defendant did, during the term, at his own cost, bear, pay, and discharge all taxes and assessments whatsoever for or in respect of the demised premises, save and except the level tax, property tax, and land tax.

Issue thereon.

At the trial before Hannen, J., at the Sussex Spring Assizes, the facts were as follows:—

The defendant was the lessee of a farm and premises under a lease from Thomas Bridger Adames. The terms of the lease were, so far as material, those already set out in the declaration. The plaintiffs were the assignees of the reversion under a settlement dated the 25th of February, 1859. Adames, the lessor, was the owner of the great tithes of the land demised at the date of the lease, and the settlement included a conveyance of them to the plaintiffs as trustees of the settlement. These tithes had been commuted at 64*l.* 5*s.* per annum, and the action was brought to recover (inter alia) arrears of tithe commutation rent-charge from the 25th of February, 1859, to the 11th of October, 1869, amounting to 667*l.* 2*s.* 6*d.* Upon these facts, and upon the facts proved in relation to the other issues in the case, the verdict was entered for the defendant, leave being reserved to the plaintiffs to move to

1871

JEFFREY v. NEALE.

enter a verdict for themselves for the amount of the tithe rent-charge claimed.

April 20. *Honyman, Q.C.*, moved accordingly. The plaintiffs are entitled to recover the arrears of the tithe rent under the covenant to pay all taxes and assessments. The terms of the reddendum clearly shew that the liability to the tithe rent-charge was intended by the lease to fall on the tenant, for the rent is to be paid in full, without any deduction save certain taxes, of which tithe rent-charge is not one. The lessor might have assigned the tithe rent-charge, and not the reversion, and then the lessee must have paid the tithe-rents to the assignee, and could not have deducted them from his rent under the 80th section of the Tithe Commutation Act (6 & 7 Wm. 4, c. 71). He cited *Parish* v. *Sleeman* (1); *Baker* v. *Greenhill* (2); *The Governors of Christ's Hospital* v. *Harrild* (3).

BOVILL, C.J. I am of opinion that there should be no rule in this case. The only question which arises turns entirely on the effect of the words "taxes and assessments" in this covenant. It is not necessary to express any opinion upon the terms of the reddendum, by which it is stated that the rent is to be paid in full, without deduction, for it appears that it has been so paid. The sole question, therefore, is whether the covenant includes tithe rent-charge. Certain ordinary landlord's taxes are specifically excepted by the covenant. Tithe rent-charge, which is a charge that falls on the landlord, is not specifically referred to. Thus we find a lease which expressly deals with certain usual landlord's taxes, throwing them on the lessor, and makes no mention whatever of tithe rent-charge. It appears to me that it would be doing violence to the terms of such an instrument to hold that tithe rent-charge was intended to be included in the terms of it. It seems clear that the parties did not understand it as throwing any such charge on the tenant, for no payment in respect of it was ever made by him or claimed by the landlord before this action. So far as my experience goes in relation to

(1) 1 D. F. & J. 327; 29 L. J. (Ch.) 53. 6 Jur. N.S. 385
(2) 3 Q. B. 148. (3) 2 M. & G. 70[illegible].

matters of this nature, tithe rent-charge is never spoken of as a tax or assessment, or supposed to be included under those words, but is always the subject of express stipulation when it is intended that it should be paid by the tenant. And especially, looking to the position of these parties, it seems to me that the words cannot have the construction contended for. The case of *Parish* v. *Sleeman* (1), was cited in favour of the plaintiffs, but in that case the terms used were different; the word "outgoings" being employed. It has been frequently held that, in cases of this nature, some amount of qualification must be placed on words which at first sight might be capable of a very extensive signification, as in the cases of *Baker* v. *Greenhill* (2), and *Tidswell* v. *Whitworth* (3).

BYLES, J. I am of the same opinion. The breach is assigned upon the covenant to pay all taxes and assessments, save and except level tax, property tax, and land tax. The exception helps the construction which I should without it have been prepared to put upon the words "taxes and assessments," viz., that they do not include tithe rent-charge.

MONTAGUE SMITH, J. I am of the same opinion. A strong presumption arises from the conduct of the parties that it was never intended that the tenant should pay the tithe rent-charge. Of course we have to decide on the intention of the parties as it is to be derived from the terms of the instrument; but it is satisfactory to think that the conclusion at which we have arrived is probably such as to meet the justice of the case. The plaintiffs rely on the covenant to pay "taxes and assessments;" and unless the tithe rent-charge is included under those words they must fail. It appears to me that the tithe rent-charge is not so included. It is something which may cause an outgoing, but it is not within the ordinary meaning of the words "taxes or assessments" as used in such cases. I should come to this conclusion, looking at these words of the lease alone; but we have a right to construe them in relation to surrounding circumstances as they existed when the lease was granted, and to take into consideration the fact that the

(1) 1 D. F. & J. 326; 29 L. J. (Ch.) 53.

(2) 3 Q. B. 148.

(3) Law. Rep. 2 C. P. 326.

1871

JEFFREY v. NEALE.

lessor was himself the owner of the tithes. It seems to me still clearer, looking to that fact, that this covenant was not intended to include tithe rent-charge. No question now arises upon the construction of the covenant to pay the rent without deduction with relation to the tithe rent-charge, for the rent appears to have been paid in full. If the plaintiff has any remedy it must be as owner of the rent-charge by distraining for so much of the arrears as the 82nd section of the Tithe Commutation Act will allow. I do not, however, express any opinion on the question whether he is entitled to do this under the circumstances of this case. If there has been an understanding that the lessee should hold free of tithe rent-charge, a Court of Equity might perhaps interfere to prevent its recovery by this means.

BRETT, J. This action is not by the plaintiffs in the character of tithe-owners, but of assignees of defendant's lessor for the alleged breach of a covenant in the lease. The whole question, therefore, is whether there was a covenant to pay this rent-charge. Two portions of the lease were relied on on behalf of the plaintiffs as shewing either an implied or express covenant to pay. First, the reddendum was relied on, in which it is stated that the rent is to be paid without deduction, save for level tax, property tax, and land tax. What may be the true construction of this provision it is unnecessary to determine, for the facts do not raise any question upon it, inasmuch as the rent has been paid without any deduction. Whether the plaintiffs, as owners of the tithe rent-charge, have a right to distrain for a certain amount of the arrears, and whether, if they were to do so, the terms of the lease would prevent the defendant from deducting the amount from his rent, we are not called upon to decide. The question raised by the declaration and the facts proved depends altogether upon the construction of the express covenant to pay taxes and assessments. If it had been necessary to determine what the effect of the words "taxes and assessments" might be upon consideration of other cases, I might have felt it somewhat unsafe to come to a decision without affording an opportunity for argument upon the subject. No cases, however, have been cited which can in any way help us in the construction of the lease now before us. That being so, I have no

difficulty, upon the terms of this lease, in coming to the conclusion that the tithe rent-charge was not a tax or assessment within the meaning of it.

1871

JEFFREY v. NEALE.

Rule refused.

Attorneys for plaintiffs: *Eyre & Co.*

EX PARTE THE OVERSEERS OF THE TOWNSHIP OF EVERTON.

April 18.

*Practice—Costs—Prohibition—*1 *Wm.* 4, *c.* 21, *s.* 1—"*Judgment.*"

The statute 1 Wm. 4, c. 21, s. 1, does not entitle the applicant for a prohibition to his costs where the rule for a prohibition is made absolute without pleadings, as in such case there is no "judgment" within the meaning of the section. *Rex* v. *Kealing* (1 Dowl. 440) followed.

In this case a rule had been obtained on behalf of the Overseers of the Township of Everton, calling on the Liverpool United Gas Company, and the Recorder of Liverpool, to shew cause why a prohibition should not issue against any further proceedings in an appeal to the quarter sessions, in which the Liverpool United Gas Company were appellants, and the Overseers of Everton were respondents, on the ground that such appeal had not been commenced within the time limited by statute in that behalf, and consequently there was no jurisdiction in the sessions to entertain it. Upon argument, the rule was made absolute.

April 18. *Dowdeswell, Q.C.*, applied on behalf of the Overseers of Everton for a direction to the Master to tax their costs of the application for the prohibition. The overseers are entitled to their costs under 1 Wm. 4, c. 21, s. 1. The Master refuses to tax on the ground that there is no judgment on which he can tax the costs, but it is contended that the making the rule absolute is a judgment within the meaning of the Act. On applications for a prohibition, the Court pursues one of two courses: where the matter is clear, the rule is made absolute on argument; where it is doubtful, the applicant is directed to declare in prohibition, and the rule is meanwhile enlarged. Then, if the applicant is successful on demurrer or issue of fact, he comes to the Court and applies that the rule may be made absolute. In the latter case

1871

EX PARTE OVERSEERS OF EVERTON.

he would be entitled to costs, under 1 Wm. 4, c. 21, s. 1, *Ex parte Tucker* (1), and there is no difference between such a case and one where the rule is made absolute in the first instance. By the Act, the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings. The words, "or otherwise," would cover the case where the judgment is given by making the rule absolute in the first instance, as well as that where the judgment is given upon pleadings.

[BOVILL, C.J. Does not the term "judgment" in the Act mean a judgment in the technical sense of the word, viz., the judgment on the record, not the mere decision of the Court on the rule? It is stated in Gray on Costs, 447, that the Act only gives costs where there are pleadings.]

He also cited *Rex* v. *Kealing* (2), and *Gegge* v. *Jones* (3).

BOVILL, C.J. I am of opinion that this application should be refused. It was held in the case of *Pewtress* v. *Harvey* (4), upon the construction of 8 & 9 Wm. 3, c. 11, s. 3, which related to costs in prohibition, that the plaintiff could only get costs under that Act on obtaining judgment after plea pleaded or demurrer joined. In the case of *Rex* v. *Kealing* (2), it was held by Patteson, J., that the Act now in question does not apply where there are no pleadings. On looking to the terms of the Act, it seems to me that that decision was correct, and the Act does not apply except where there is a judgment in the legal sense of the word, that is on pleadings, and the costs are taxed on such judgment. If the view of the statute contended for were correct, the Court would have no discretion, and the costs would follow the event. This would not be reasonable in relation to proceedings of a summary nature, in cases where the mistake is that of the Court against which prohibition is sought, rather than of the party.

BYLES, MONTAGUE SMITH, and BRETT, JJ., concurred.

Application refused.

Attorney for applicant: *Goldring, for Holden & Cleaver.*

(1) 4 M. & G. 1079.
(2) 1 Dowl. 440.
(3) 2 Stra. 1149.
(4) 1 B. & Ad. 154.

VESTRY OF BERMONDSEY *v.* RAMSEY.

1871
April 29.

Metropolis Local Management Acts (18 & 19 *Vict. c.* 120; 25 & 26 *Vict. c.* 102, *ss.* 77 *and* 96)—*Proportion of Paving Expenses—Action against Occupier after Judgment recovered against Owner — Cumulative Remedies — Res Judicata.*

The 77th and 96th sections of the Metropolis Local Management Amendment Act, 1862, make certain paving expenses recoverable by the vestry by action from the present or any future owner of premises, or from any person who then or thereafter occupies the premises.

The vestry had recovered a judgment against a former owner of certain premises in respect of such expenses, which remained unsatisfied :—

Held, that such judgment was no bar to a subsequent action for the same expenses against the defendant, who occupied the premises as tenant to a succeeding owner.

Appeal from the County Court of Surrey.

The action was brought to recover the sum of 38*l.* 5*s.* 4*d.*, being a proportion of the expense of paving a thoroughfare lately known as St. James Street, but now called Layard Road, in the parish of Bermondsey, under the provisions of 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102.

The plaintiffs were the vestry of the parish of Bermondsey, and the defendant was the occupier of the premises, No. 7 Layard Road, aforesaid. A notice of the intention of the plaintiffs to pave the said street was served on John Richardson Soper, on the 10th of March, 1866, he then being the owner of the said premises, and he was required to pay the amount of the estimated proportion of the cost of the work on the 10th of April following. Soper having made default in payment, an action was commenced against him in the Court of Common Pleas for the amount, and judgment was signed on the 6th of November, 1866, for the sum of 38*l.* 5*s.* 4*d.* for debt, and 25*l.* 2*s.* 2*d.* for costs, but no execution or other proceedings taken thereon. Such judgment was consented to by Soper, on the understanding that it should not be enforced for a certain period, and immediately afterwards he executed a deed of arrangement, which was duly registered, but nothing was ever paid to the plaintiffs under the deed. Subsequently to the execution of the deed, the premises came into the possession of the Rev. John Milner, who was the mortgagee of the premises. On

1871

VESTRY OF BERMONDSEY v. RAMSEY.

or about the 24th of October, 1867, Milner sold the premises to Mr. Thomas Herbert, the present owner, and application was made by the vestry to his solicitors for the payment of the amount due, but no part of the same was paid. Milner still retained in his hands a sum of money due and owing to Soper greater than the amount of the judgment against him, and the vestry had never taken any steps to attach such debt in execution. The fact, however, that such sum of money was due never came to the knowledge of the vestry before the present action. The vestry had never issued any writ of execution under the judgment against the premises. On the 15th of April, 1869, a notice was served on Herbert, requiring him to pay the said sum of 38*l.* 5*s.* 4*d.*; and he not paying the same, on the 16th of July, 1869, a notice was served on the defendant, who was the then occupier of the premises, pursuant to the 96th section of 25 & 26 Vict. c. 102, requiring her to pay the said amount of 38*l.* 5*s.* 4*d.*, and further giving her notice not to pay any rent to her landlord without first deducting the same. Application was made to her by the plaintiffs to disclose the amount of the rent payable by her in respect of the premises, but she wholly refused to do so.

Upon the above facts, the judge of the county court gave judgment in favour of the defendant, but reserved for the opinion of the Court the following question: whether the plaintiffs, having proceeded and obtained judgment against a former owner of the premises for the amount of the proportion of the expenses of paving the said street, and the said judgment being still unsatisfied, and the plaintiffs having taken no proceedings to enforce the same against the said judgment debtor by attaching the debt due to him from Milner, and not having issued execution and registered the same, in order to charge the premises as against a mortgagee, or purchaser, in manner provided by the statutes 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, the plaintiffs were entitled to proceed against a subsequent owner or occupier for the recovery of the amount of the proportion of expenses of paving the street. (1)

(1) By the 25 & 26 Vict. c. 102, ss. 77 and 96, it is provided as follows:

S. 77. "Where any vestry or district board shall, under the powers given by the 105th section of 8 & 9 Vict. c. 120, have paved, or be about to pave, any new street, the owners of the land bounding or abutting on such

A. Wills (*Thomas* with him), for the plaintiffs. The remedy against the occupier is not affected by the unsatisfied judgment against the owner. The effect of the Act is, that the expense of works which are for the improvement of the premises is made, in substance, a charge upon them. There is no hardship in this. The recovery from the occupier can only be to the extent of the rent due, unless he refuse to disclose what is so due.

Poynter, for the defendant. The remedies given are alternative, not cumulative. The vestry having elected to sue the former owner, and recovered judgment against him, cannot now sue the occupier. The doctrine of transit in rem judicatam applies. He cited *St. Pancras Vestry* v. *Batterbury*. (1)

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street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein: provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including, &c., shall be apportioned by the vestry or board, and shall be recoverable, either before the work shall be commenced, or during its progress, or after its completion: and it shall be lawful for the vestry or district board, at their discretion, to accept payment of the amount apportioned or charged in respect of each house or premises, by instalments spread over a period not exceeding twenty years; and any such amount shall be recoverable from the present or any future owner of the premises, either by action at law, or in a summary manner before a justice of the peace, at the option of the vestry or board."

S. 96. "It shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under 8 & 9 Vict. c. 120 or this Act, either from the owner, or from any person who then, or at any time thereafter, occupies such premises; and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorized by the recited Act, and this Act; and the owner shall allow such occupier to deduct the sums of money which he so pays out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent: provided always, that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after such demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses, becomes payable by such occupier, unless he refuse, on application being made to him for that purpose by or on behalf of the vestry or district board, truly to disclose the amount of his rent, and the name and address of the person to whom such rent is payable. . . ."

(1) 2 C. B. (N.S.) 477; 26 L. J. (C.P.) 243.

1871

VESTRY OF BERMONDSEY v. RAMSEY.

A. Wills, in reply, cited Woodfall's Landlord and Tenant (10th ed.) pp. 201, 207.

Cur. adv. vult.

April 29. The judgment of the Court (Willes, Montague Smith, and Brett, JJ.), was delivered by

MONTAGUE SMITH, J. In this appeal from the judge of the Southwark County Court, which was argued before my Brothers Willes and Brett and myself, the question is whether the unsatisfied judgment recovered by the vestry for 38*l.* 5*s.* 4*d.*, in respect of the expenses of paving a street under the Metropolis Local Management Acts, against a former owner of the tenements occupied by the respondent as tenant under a succeeding owner, is a bar to an action against the respondent as such occupier?

The 25 & 26 Vict. c. 102, s. 77, makes such expenses recoverable "from the present or any future owner of the property, either by action at law, or in a summary manner before a justice of the peace, at the option of the vestry." The 96th section empowers the vestry to require the payment "either from the owner, or from any person who then or at any time thereafter occupies the premises," and enacts that "such owner or occupier shall be liable to pay the same, and the same shall be recovered in the manner authorized by the Act."

The occupier is only liable, under the provisions of the Act, to the extent of rent actually due or accruing due after notice; and he is empowered to deduct the payments from his rent.

The charge of 38*l.* 5*s.* 4*d.* became payable in 1866, when Soper was owner; and a judgment was obtained in this Court against him in an action for that amount, on the 6th of November, 1866. Herbert subsequently became owner, and the defendant occupies the premises as his tenant. It is not contended that, under the circumstances stated in the case, the defendant would not, as the present occupier, be liable to pay the unpaid proportion of the expense of paving, unless the judgment recovered against Soper is a bar to the action.

The statute 25 & 26 Vict. c. 102 for the first time gives a remedy by action to recover these charges. The question therefore to be decided—viz., whether the judgment obtained against the

former owner is a bar to the remedy by action against the occupier—is of the first impression, and it is necessary to ascertain the nature of the obligation imposed by the above-mentioned statute. In the first instance, the statute creates a personal obligation on the owner, "present or future," and, further to secure the payment, imposes a kind of indirect charge on the land. The 96th section imposes the obligation to pay, and gives the remedy against either the owner or any person who then, "or at any time thereafter," occupies the premises. These obligations, and the remedies given to enforce them, appear to us to be independent and cumulative; and, as a consequence of so holding, we think the remedies may be resorted to in succession, until the charge is satisfied by payment—subject, when necessary, to the equitable jurisdiction exercised by the Court to restrain vexatious actions.

The obligation is clearly not a joint obligation, and the owner and occupier could not be sued together; and, this being so, there is no objection of a technical kind, arising from a change of remedy, to prevent the occupier being sued after a judgment against the owner. And we see no substantial ground arising from the nature of the obligation, according to our interpretation of the statute, to render the judgment alone, without satisfaction, a good answer.

No doubt, in the case of a joint liability giving a joint cause of action against several, the recovery of judgment against one of the obligees is a bar to an action against the others: *King* v. *Hoare*. (1) But this is not so where the liability is joint and several, or where several parties are independently and collaterally bound to the same obligation.

The principle is well expressed by Lord Ellenborough, C.J., in *Drake* v. *Mitchell*. (2) In that case, one of three joint covenantors had given a bill of exchange for the debt secured by the covenant, on which bill judgment was recovered; and it was held that this judgment was no bar to an action of covenant against the three. Lord Ellenborough said (3): "I have always understood the principle of transit in rem judicatam to relate only to the particular cause of action in which the judgment is recovered

(1) 13 M. & W. 494.

(2) 3 East, 251.

(3) At p. 258.

1871

VESTRY OF BERMONDSEY v. RAMSEY.

operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have."

In the present case, the judgment recovered against the owner has created a change of remedy quoad him. But we think it does not operate to affect the collateral concurrent remedy against the occupier. The principle is illustrated by the familiar instance of action against the several parties to a bill of exchange, and by the cases, which have a close analogy to the present, of principals and sureties, in which the recovery of judgment against one party is no bar to actions against the others.

For these reasons we think the plaintiffs are entitled to maintain the action, and consequently that the judgment given for the defendant must be reversed, and the judgment entered for the plaintiffs with costs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Drew & Wilkinson.*

Attorneys for defendant: *Morris, Stone, Townson, & Morris.*

May 5.

MAHONY AND ANOTHER *v.* THE NATIONAL WIDOWS' LIFE ASSURANCE FUND, LIMITED.

Practice—Inspection of Documents—14 & 15 *Vict. c.* 99, *s.* 6—*Privilege—Report made to Insurance Company by Medical Man as their Agent—Private Friends' Report.*

In an action against an insurance company upon a policy of life insurance, the defendants having pleaded that the policy was obtained by fraudulent concealment and misrepresentation of material facts, the plaintiffs applied for inspection of the following documents: viz., two reports made to the company by private friends of the assured, to whom the company were referred, with relation to the assured's state of health and habits; and a report made by a medical man to whom the assured was referred for examination on behalf of the company. At the head of the printed forms of questions, upon which these reports were made, were statements that the company would regard the answers given as strictly private and confidential. It appeared from the plaintiffs' affidavits that the company, on accepting the insurance, after consideration of the proposals for insurance, and of

1871

MAHONY v. WIDOWS' LIFE ASSURANCE FUND.

these reports, had charged a special rate of premium on the ground that the life was not a first-class one:—

The Court allowed inspection of the documents, on the ground that they were not privileged from inspection, and the plaintiffs had made out a good primâ facie case for supposing that they were material to their case.

THIS was an application by the plaintiffs for inspection of certain documents in the defendants' possession.

The action was brought on a policy of insurance effected by the plaintiffs with the defendants on the life of one O'Grady.

The defendants pleaded:—1. That the declaration and statement agreed on as the basis of the insurance were untrue; 2. That the policy was obtained by fraudulent concealment and misrepresentation of material facts. Particulars of fraud were delivered under the pleas in accordance with a judge's order, by which (inter alia) it was stated that a misrepresentation had been made with regard to the assured's being of temperate habits.

The documents of which inspection was sought were:—1st. Two reports made by private friends of the person whose life was assured, to whom the defendants were referred by the plaintiffs upon the proposal for an insurance being made. These reports consisted of answers to various questions proposed by the insurance company to the friends, respecting the assured's state of health and habits, and the printed form in which these questions and the answers were contained was headed by a statement that the replies would be considered strictly private and confidential. 2ndly. A report made by a medical man living in the neighbourhood of the person whose life was assured, to whom he was referred for examination on behalf of the company. This report was made on a form containing various questions, and headed as follows: "Confidential medical examination on behalf of the National Widows' Life Assurance Fund, Limited, which, when filled up and signed by the medical referee, is to be forwarded direct to the head office of the company; and the referee is advised not to disclose to the person under examination the nature of his report, nor the opinion formed by him, which will be held by the office as strictly private." On the same paper as this form, on the other side, was another form, containing various questions to be answered by the person whose life was assured, with the answers thereto, headed: "Per-

1871

MAHONY v. WIDOWS' LIFE ASSURANCE FUND.

sonal statement to be made to the medical referee of the National Widows' Life Assurance Fund, Limited, previously to his report being made, as on the other side." The answers to these questions were declared to be part of the original contract for the assurance to be effected. It appeared from the plaintiffs' affidavits that, after the private friends' reports and the confidential medical examination were sent in to the office, the proposal for the insurance was accepted by the defendants' company; but the defendants' manager, in the letter containing the acceptance, stated that Mr. O'Grady's life was not of a select first-class, and that the board had therefore been obliged to charge a special rate required upon the merits of the case. The affidavit of the plaintiffs' attorney's clerk, who had the conduct of the action, also stated his belief that the defendants were influenced by, and acted upon, the report of their medical man, and of the private friends, as well as the answers sent in on the part of the assured, and, as a consequence thereof, charged and received an increased premium, amounting to double the ordinary rate.

A rule nisi having been obtained for inspection of the documents,

Lord shewed cause. The defendants are not bound to produce the private friends' reports. They were obtained under a promise of secrecy. It is obvious that great inconvenience might arise in the conduct of the business of insurance offices, unless the answers obtained from the private friends of the assured, with relation to his habits and antecedents, were treated as confidential. The practice of insurance offices with relation to these private friends' reports is so notorious that it must be taken that the persons effecting the insurance were parties to the understanding that these answers were never to be divulged. Even if there is no promise on their part, and no legal privilege, the Court has a discretion in giving inspection; and those reports having been obtained, from parties who were not bound to make them, on the understanding that they were to be confidential, the Court will not order inspection of them. For anything that appears on the plaintiffs' affidavits, this may be a mere fishing application. The same arguments apply, though, it must be admitted, less strongly, to the confidential medical examination.

Joyce supported the rule. It is obvious that, with reference to the issue whether the defendants were induced by misrepresentation to enter into the contract of insurance, these documents may be most material to the plaintiffs' case. The plaintiffs have laid sufficient grounds for supposing that they are material. It is shewn that, upon the consideration of these reports, the defendants charged a special rate of premium on the ground that the life was not a select one. The defendants have not shewn any reason for not producing the documents, except that they are confidential. That is no legal ground of privilege. It is clear that the defendants could not at the trial resist the contents of these reports being made evidence on that ground. The medical man's report is within the decision in the case of *Woolley* v. *Pole.* (1)

[He also cited *Cossey* v. *Brighton Ry. Co.* (2)]

BOVILL, C.J. I am of opinion that this rule should be made absolute. It is not disputed that the plaintiffs are entitled to inspection of the personal statement made to the medical referee by the assured; but it is contended that inspection ought not to be granted of another document on the other side of the same piece of paper, called the "Confidential Medical Examination." This latter document is a report made to the office of the insurance company by a medical man employed as their agent on the occasion of the insurance being effected. The opinion of the medical man, as contained in this report, is the foundation of the conclusion to which the company come, and upon which they act in granting the insurance. The result of this examination appears to be that communicated in the manager's letter, which states that the board had come to the conclusion, that the life was not a select first-class one; and the affidavit states that the plaintiffs' attorney believes, that the defendants acted upon the report of the medical man and the private friends, and in consequence thereof charged a double premium. It is obvious that it may be most material to plaintiffs' case, when a charge of misrepresentation is made by the insurance company with respect to the assured's being of temperate habits, that such a document as this should be produced. The case, with

(1) 14 C. B. (N.S.) 538; 32 L. J. (C. P.) 263.
(2) Law Rep. 5 C. P. 146.

1871

MAHONY v. WIDOWS' LIFE ASSURANCE FUND.

respect to this document, is distinctly within the decision in *Woolley* v. *Pole* (1), where inspection was granted of documents which had passed between an agent of an insurance office and the office with relation to the value of property insured against fire when the insurance was being effected. The company cannot be privileged from producing a report made by their officer upon which they acted in granting the insurance. Then with regard to the private friends' reports, there is no authority for saying that inspection ought not to be granted of such documents, but it is urged that they are confidential as between the parties who wrote them and the company who receive them. No doubt, as between these parties and the company, it is stated that they shall be confidential; but on what principle is that to affect the plaintiffs, when a dispute arises between them and the company? The company now complain that they have been deceived in effecting this insurance. In so doing they acted on the proposal made by the plaintiffs, on the personal statement and medical officer's report, and also on these reports by private friends. Upon the issue, whether the company were deceived or no, it may be most essential to the plaintiffs' case to know what the statements contained in these last documents were. I do not say that in every case the Court would order such documents as these to be produced. The Court has a discretion, and is bound to exercise it according to the circumstances of the particular case. It is easy to see that in some cases these documents may be of importance, and in others not. Here, there are no grounds shewn by the affidavits why they should not be produced, except the mere fact that they are stated to be confidential as between the insurance office and the parties who wrote them. That is not any legal ground of privilege. The same principles appear to apply to them as to the report of the company's medical man. It therefore appears to me, that it is within the power of the Court to order inspection; and with regard to the question of discretion, a primâ facie case has been made out for allowing such inspection, to which no answer has been given on the other side.

MONTAGUE SMITH, J. I am of the same opinion. A sufficient

(1) 14 C. B. (N.S.) 538; 32 L. J. (C. P.) 263.

ground has clearly been laid by the plaintiffs for supposing that these documents may be material to their case upon the questions at issue. That being so, we have to see whether any sufficient objection has been raised to the inspection of them on the ground of any privilege or exemption from the general rule, that material documents must be produced unless they relate exclusively to the case of the party resisting production. I do not think it is possible to lay down as a general proposition, that documents of such a nature as those now in question are privileged from inspection. It may be that there are particular circumstances under which the Court might think it right to refuse to exercise its power to compel production; but there are no such circumstances here. The first document in question is the "Confidential Medical Examination." I think the only meaning to be given to the statement contained in the form, that the report will be strictly private, is that the company will not needlessly disclose it. For the purpose of this examination the medical man was the agent of the defendants, and his report to them comes within the principle of the decision in *Woolley* v. *North London Ry. Co.* (1), and not within the exception admitted in the case of *Cossey* v. *Brighton Ry. Co.* (2), where it was held that reports made to a railway company by their agents in view of impending litigation were privileged. With regard to the reports of the private friends of the assured, to whom the insurance office was referred by him, I have endeavoured to see whether any sufficient legal ground has been put forward for holding them privileged. I can see that some inconvenience may result from their being liable to inspection, but I fail to discover any legal ground on which the Court can refuse inspection of them. They may be most material evidence for the plaintiffs. That being so, there must be some ground of privilege, legal or equitable, on which their exemption from liability to inspection, if any, must rest. If there had been any contract on the part of the persons effecting the assurance, that they should be treated for all time as confidential, that might have been such a ground. It does not seem to me that any such contract can be made out. I cannot conceive that the parties who made these reports, if called upon at the trial to give secondary evidence of their contents, in conse-

(1) Law Rep. 4 C. P. 602. (2) Law Rep. 5 C. P. 146.

1871

MAHONY v. WIDOWS' LIFE ASSURANCE FUND.

quence of the refusal of the defendants to produce them, could object to do so. It seems to me very proper that secrecy should, in general, be observed in respect of them; but the object of both the contracting parties might be defeated if this secrecy were extended to the case of a dispute between the representatives of the assured and the insurance company, for these documents form, to some extent, the basis upon which the insurance is made. I think, therefore, that no sufficient ground has been shewn in this case why inspection of these documents should not be allowed; but I wish to guard myself from saying, that if peculiar circumstances were shewn with reference to reports of this kind, such as to induce the Court to think that inspection could not fairly and equitably be demanded of them, the Court might not refuse to allow such inspection. In this case it does not seem to me that any such circumstances have been shewn.

BRETT, J. The objection made is to the inspection of two sorts of documents: 1st, the confidential medical examination; 2ndly, the private friends' reports. With respect to the first, I have no doubt whatever. It is a report made by an agent of the company to the company for its information, not with a view to impending litigation, but with a view to the contract as to which it is now alleged that they were deceived. It clearly comes within the principle of the decision in *Woolley* v. *Pole* (1), and that in *Woolley* v. *North London Ry. Co.* (2). With respect to the private friends' reports, it was urged that there was an implied contract on the part of the parties effecting the insurance with the company, or the persons making these reports, that they should not be disclosed; but without saying what the effect would be if there were, it is sufficient for me to say that I do not think any such contract is made out. Then it was said that these reports were procured from persons who were not bound to make them, by means of an understanding that they should be confidential, and that under these circumstances the Court, having a discretion in the matter, would refuse to order inspection of them. I do not say whether the rule may not be, not to order inspection of documents

(1) 14 C. B. (N.S.) 538; 32 L. J. (C.P.) 263.
(2) Law Rep. 4 C. P. 602.

so obtained, unless the party claiming inspection first lays a ground for ordering it, by shewing that the equity of the case calls for the production of the documents in the particular case. I think the plaintiffs have laid such a ground in the present case. The affidavits shew, that after receiving these reports the company demanded an increased premium, as on an extraordinary risk, and the letter written by their manager would seem to shew that they acted on information contained in those very documents. These facts appear to me to shew that their contents may be of very great importance to the plaintiffs' case.

Rule absolute.

Attorneys for plaintiffs: *Baxter, Rose, & Norton.*
Attorneys for defendants: *Stephens & Langdale.*

BUSTROS AND OTHERS *v.* LENDERS. *May* 8.

Practice—Stay of Proceedings—Agreement to Refer—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125, *s.* 11)—*Costs—Variation of Order after Award.*

An order was made at chambers, under the 11th section of the Common Law Procedure Act, 1854, staying proceedings in an action brought on a contract containing an agreement to refer disputes arising thereunder. The order made no provision as to the costs of the action. The matter in dispute being afterwards referred to arbitration, an award was made in favour of the plaintiffs:—

Held (Per Bovill, C.J., Byles and Montague Smith, JJ.; Brett, J., dissenting), that there was jurisdiction under the 11th section, after the award had been made, to make an order varying the terms of the original order by directing that the defendant should pay the costs of the action.

THIS was an application to rescind an order made by one of the masters of the court, and confirmed on appeal by a judge at chambers, that the defendant should pay to the plaintiffs the costs of the action.

The action was upon a contract for the sale of corn by the plaintiffs to the defendant, for refusal on the part of defendant to accept the corn. The contract, which was reduced to writing, contained an agreement to refer any dispute arising under it to arbitration. The defendant, after declaration and before plea, took out a summons, under the 11th section of the Common Law Procedure Act, 1854,

1871

BUSTROS v. LENDERS.

calling on the plaintiffs to shew cause why all further proceedings in the cause should not be stayed, the parties having agreed to refer the matters in dispute, and why the plaintiffs should not pay to the defendant the costs of the action and application. The application was heard before Master Benett, who ordered a stay of proceedings, the defendant undertaking not to set up the defence of fraud, but made no order as to costs. This order was confirmed on appeal by Cleasby, B., at chambers. The parties then proceeded to arbitration, and the arbitrator finally made an award in favour of the plaintiffs. The plaintiffs then took out a summons, calling on the defendant to shew cause why the defendant should not pay to the plaintiffs the costs of the action. The application was heard before Master Kaye, who made an order in the terms asked for. The defendant appealed against this order, and it was confirmed by Pigott, B., at chambers. The fact that the award had been made in the plaintiffs' favour was the only additional fact brought forward, on the hearing of the second summons, in addition to the facts that had been brought before Master Benett and Cleasby, B., on the first summons (1).

A rule nisi had been obtained to rescind this order, on the ground that there was no longer any jurisdiction to make it at the time when it was made.

(1) By the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 11, it is enacted as follows: "Whenever the parties to any deed or instrument in writing, to be hereafter made or executed, or any of them, shall agree that any then existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so agreeing, or any person or persons claiming through or under him or them, shall, nevertheless, commence any action at law or suit in equity against the other party or parties, or any of them, or against any person or persons claiming, through or under him or them, in respect of the matters so agreed to be referred, or any of them, it shall be lawful for the court in which action or suit is brought, or a judge thereof on application by the defendant or defendants, or any of them, after appearance and before plea or answer—upon being satisfied that no sufficient reason exists why such matter cannot or ought not to be referred to arbitration, according to such agreement as aforesaid, and that the defendant was, at the time of the bringing of such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration—to make a rule or order staying all proceedings in such action or suit, on such terms as to costs or otherwise as to such court or judge may seem fit: Provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require."

Watkin Williams shewed cause. It will hardly be contended that the master who dealt with the summons to stay proceedings could not have imposed payment of costs as a term of the order to stay. The words of the proviso to the 11th section of the Common Law Procedure Act, 1854, enable the original order to be varied at any time. It is often far more convenient that the question of costs should be reserved, and not disposed of when the order to stay is made; at the arbitration the facts are brought out, and it appears whether there was a bonâ fide dispute, or whether the defence was groundless. In the latter case it might be proper that the defendant should pay costs, in the former not. If there was power to vary the original order at the time when the second order was made, the second order was in substance, though not in terms, a variation of the first.

Cohen supported the rule. No objection is taken to the form of the summons or order. The defendant's contention is that there is no power to impose payment of costs after the proceedings have been stayed. The original order may impose payment of costs as a term of the stay of proceedings, but it was clearly intended that the question of costs should be dealt with by the judge making the order, and not afterwards. The defendant might decline to submit to the term, and elect not to draw up the order. At any rate, it is too late to vary the order after it has taken effect, and the award has been made. The question of costs cannot generally depend on the event of the award; and in cases where the judge thinks that it does, the proper course is that the order should leave the question of costs to the arbitrator.

[He cited *Lury* v. *Pearson* (1).]

BOVILL, C.J. In this case it appears that there had originally been an application under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 11), to stay proceedings in the action, on the ground that the parties had agreed that any difference arising under the contract on which the action was brought should be referred to arbitration. The summons upon which the order granting that application was made also called on the plaintiffs to shew cause why they should not pay to the defendant the costs of

(1) 7 C. B. (N.S.) 639.

1871

BUSTROS v. LENDERS.

the action and the application. The matter was heard before Master Benett, and the order which he made was afterwards confirmed by Cleasby, B. The order made was, that all proceedings in the action should be stayed, the defendant undertaking not to set up the defence of fraud. The submitting to this order was a voluntary act on defendant's part. With respect to that part of the application which asked for costs, that question being brought to the attention of the master, he made no order as to costs. Now it may be convenient that, so far as is possible, the master or judge before whom such an application is heard, should dispose of the costs; but there may be many cases in which it would be inconvenient to dispose of them at that time, and the question of costs had better be postponed. In this case the order does not say that the question of costs is reserved, and the question now is whether, under those circumstances, there is any power under the 11th section to make an order as to costs, at a period subsequent to the making of the award. It is clear that, on the first application, the Court, or a judge, has power to make the order staying proceedings "on such terms, as to costs and otherwise," as may seem fit. Immediately following those words is a proviso, that "any such rule or order may at any time afterwards be discharged or varied as justice may require." If an order had been made for payment of costs, and it afterwards appeared, from facts disclosed on the arbitration, that it was unjust, it seems clear to me that it would be competent to the party to apply to have it varied afterwards in respect to the costs, and that such a case would come within this proviso. Again, if the question of costs had been reserved, that would give the power to make the order. What, then, is the effect of the order that was made here? In substance, though not in terms, it left each party to pay his own costs, so that, substantially, there was a decision on the question of costs. Then it appears to me that it was equally competent to a party, as in the cases I have instanced, to apply to vary the order with respect to the costs. It is true the summons taken out was not in form to vary the previous order, but Mr. Cohen took no objection on that ground; nor do I think he could have sustained any such objection, for it seems to me that the summons was, in fact and in substance, to vary the previous order. The language of the proviso is so framed as to give the

widest jurisdiction to vary the order to meet the justice of the case. It was urged that, the proceedings being stayed, the power to give costs was gone, or that at any rate the powers of the section only extend till such time as the award is made. But the words of the proviso are "at any time," and I do not see why we should limit the natural meaning of those words, the object of which seems to me to have been to give the largest discretion. I can conceive many reasons why it might be of importance that the jurisdiction should exist subsequently to the arbitration, for then all the facts are known, and the justice of the case may assume a different complexion from that which it wore at the time of the original order. I think, therefore, that there was power to make this order under the 11th section. Then, with regard to the propriety of it, the rule has not been moved on the ground that it was an improper exercise of the master's discretion; and even if it were otherwise, nothing has been said that shews that such discretion was improperly exercised. For these reasons I think the rule ought to be discharged.

BYLES, J. I am of the same opinion. I think that the terms of the proviso to the 11th section clearly enabled this order to be made.

MONTAGUE SMITH, J. I am of the same opinion. As a matter of practice, it may be convenient as a general rule to decide or expressly reserve the question of costs on the original application, and that only under special circumstances should an order for costs be afterwards made, and the original order so far varied. But I am clearly of opinion that there is jurisdiction at any time, under the proviso, to vary the original order by directing that either party shall pay costs. I think, under the words of the proviso, if the original order had contained a direction that one party should pay costs, it might so far be discharged or varied by a direction that the other party should pay them. Such a variation may, it seems to me, be made at any time; though I think the Court or a judge ought to be slow to exercise the power to make it, and in general the question should be decided by the judge who hears the original application. It was argued that the jurisdiction was

1871

BUSTROS v. LENDERS.

limited to the time before the making of the award. I cannot see anything which points to such a limitation of the natural meaning of the words of the section. The order to stay is an order made in the action; it does not in any way touch the award. The intention seems to be that the Court should have the fullest power to deal with the order at any time, as justice may require. Then, there being jurisdiction, the making of the order for costs becomes a mere question of discretion. The master and a judge having both come to the conclusion that it ought to be made, we ought not to interfere unless we are satisfied that it was manifestly an erroneous exercise of their discretion. I cannot, in the present case, see any grounds for supposing that this order may not have been quite consistent with justice.

BRETT, J. It is to be presumed that the conclusion at which I have arrived is wrong, inasmuch as I have the misfortune to differ from the rest of the Court. I am of opinion that Master Kaye had no jurisdiction to make this order as to costs. At the time when it was made, an original order had been made by Master Benett, upon a summons asking for costs, and confirmed by Cleasby, B., and the arbitration had been closed by a valid award, which the defendant is unable to impeach. Now, in the first place, I cannot help thinking that Mr. Cohen has been somewhat generous in conceding that this was a summons to vary, and an order varying the original order. It is admitted that there were no new facts before Master Kaye, except that the arbitration had terminated in the plaintiff's favour; and if this order had really been treated as an order to vary the original order, the master in making it would have been acting against the ordinary rule, that the master does not vary an order made by the judge. It does not appear to me that he can have intended to vary an order made by another master, and confirmed by a judge on precisely the same state of facts. However, this point having been given up, this must now be treated as an application to vary the former order; and I think that even so there was no jurisdiction to vary the former order, on the ground that the arbitration was concluded. I do not say that the words in the proviso, looked at alone, are not large enough to cover this case, but for reasons I will now give, I think that, looking to

the general intention of the section, a necessary implication arises that no application to vary the original order can be made after the arbitration is over. This is a question of great importance; for if this jurisdiction exists, the order staying proceedings might be set aside, and the plaintiff left at liberty to proceed with his action after the result of an arbitration had been against him. The question depends on the meaning of the 11th section. What is it, then, that the order under that section is to deal with, and what is the subject-matter of judicial decision under it? It says: "Whenever the parties to any deed or instrument, &c., shall agree that any then existing or future difference between them shall be referred to arbitration, and any one or more of the parties so agreeing shall, nevertheless, commence an action, it shall be lawful for the Court, or a judge, on being satisfied that no sufficient reason exists why such matters cannot or ought not to be referred to arbitration, according to such agreement, and that the defendant is ready to join and concur in all acts necessary and proper for causing such matter so to be decided by arbitration, to make a rule or order," &c. Therefore the subject-matter of judicial decision is, whether the case ought to go to arbitration, and the judge ought not to stay proceedings, except for the purpose of causing it to proceed to arbitration. The moment the arbitration is concluded, nothing remains with which an original order could deal. The subject-matter to which the powers of the section are applicable is exhausted. Applying, then, the words of the proviso to the subject of the rest of the section, it appears to me clear that the effect is only to enable the original order to be varied in such a way as that it might, as varied, have been an original order under the section. If the award be made, how can you treat the varied order as being one to determine whether there is to be an arbitration or not? It seems to me, for these reasons, that the words "at any time" must be limited by reference to the subject-matter of the whole section to the time before the award is made. I do not say that after the arbitration had begun, and while it was pending, if it turned out that it was not proper that it should be proceeded with, the stay of proceedings might not be taken off, and the action allowed to proceed. But it seems to me contrary to the intention of the section, upon a fair interpretation of the whole of it taken together,

1871

BUSTROS v. LENDERS.

that after the arbitration is closed there should be a jurisdiction practically to set the award aside, or impose terms on the defendant which he might not in the first instance have submitted to. For these reasons, in my opinion, the rule ought to be made absolute.

Rule discharged.

Attorneys for plaintiff: *Freshfields.*

Attorneys for defendant: *Thomas & Hollams.*

[REGISTRATION CASES.]*

1870
Nov. 11.

WARBURTON, APPELLANT; THE OVERSEERS OF THE TOWNSHIP OF DENTON, RESPONDENTS.

Parliament—County Vote—Lessee or Assignee—Chattel Rent-charge—30 & 31 Vict. c. 102, s. 5.

By 30 & 31 Vict. c. 102, s. 5, a county vote is conferred upon every man who is entitled either as lessee or assignee to any lands or tenements of freehold, or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years, of the clear yearly value of not less than 5*l.* :—

Held, that a person, to be entitled to a vote under this provision, must be lessee of a corporeal hereditament, which could be the subject of occupation, or assignee of a lease of such an hereditament, and that a chattel rent-charge, though originally created for more than sixty years, does not confer a vote.

APPEAL from the Revising Barrister for the south-eastern division of the county of Lancaster.

John Somerton claimed to be inserted in the list of voters for the township of Denton, and was duly objected to. The nature of his qualification, as stated in his claim, was, "Annuity or rent-charge arising out of lands and buildings, held for a term over sixty years, determinable on lives."

The qualification he possessed was proved to be an interest under a deed of settlement, dated the 5th of January, 1837.

Gabriel Lupton, the settlor, was seised of an estate of inheritance in fee simple in certain lands and hereditaments in the township of Denton. By the said deed he conveyed these lands and hereditaments, after certain prior limitations since determined, to certain trustees, for 100 years, if the said John Somerton, and certain other persons in the deed named, should so long live, to the use, amongst other things, that Somerton, his executors and administrators, should thenceforth, during the said term of 100 years, determinable as aforesaid, have, receive, and take by and out of the rents, issues, and profits of the said messuages, lands, and hereditaments, one annuity or yearly rent-charge, or sum of 10*l.* of lawful British money. The deed contained no power of

* For convenience of reference, the Registration Cases for this year are all collected here, irrespective of the Term in which they were decided.

1870

WARBURTON v. OVERSEERS OF DENTON.

distress on any of the lands settled in case of default in the payment of the annuity.

It was objected: 1st. That the yearly payment was not a rent-charge, but a chattel; and, therefore, not within the statutes of 8 Hen. 6, 2 Wm. 4, c. 45, or 30 & 31 Vict. c. 102, so far as such statutes, or any of them, confer the right of voting on persons seised of lands or tenements for an estate in fee simple, or for lives, of the clear yearly value of 40*s*. 2ndly. That by the terms of the deed, such yearly sum was to be paid out of the rents and profits of the lands and hereditaments, and was not charged on the corpus of the estate; and, therefore, was not an estate arising out of land. 3rdly. That Somerton was not entitled within the 5th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102).

It was contended on behalf of Somerton that he was entitled as lessee to a tenement for the unexpired residue of a term originally created for a period of sixty years, determinable upon lives, of the clear yearly value of 5*l*. over and above all rents and charges payable out of, or in respect of, the same, within the 5th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102.)

The revising barrister held that Somerton was entitled to have his name inserted in the list of voters for the township of Denton in respect of the qualification stated in his claim.

Joshua Williams, Q.C. (*John Edwards* with him), for the appellant. The qualification that has been proved is a chattel rent-charge, in which the claimant has only the interest of a cestui que use; it cannot properly be described as a rent-charge arising out of lands held for a term over sixty years, and the claim is therefore insufficient. But, further, it is not a good qualification, for the 5th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), refers only to leases of corporeal hereditaments. The word "lessee" implies a landlord, and "assignee" means an assignee of such a lease. Such a chattel rent-charge is in one sense a tenement, but it is not such as is intended by the Acts. The case of *Trotter* v. *Watson* (1), though not exactly in point, shews that the section does not include every kind of interest in land for a long term of years.

The respondents did not appear.

(1) Law Rep. 4 C. P. 434.

BOVILL, C.J. The 5th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), is in substance a repetition of ss. 19, 20 of the Reform Act (2 Wm. 4, c. 45), except as to value, and the language of the earlier Act throws some light upon the true meaning of the words used in the later Act. Looking back to the earlier Act, there can be little doubt what is meant by the expressions "lessee" and "assignee;" the former seems to refer only to a lessee of corporeal hereditaments, and the word "assignee" only to the assignee of that which is held under such a lease; and I think the same sense must be given to the words of the 5th section of the later Act as to those of the 18th and 19th sections of the earlier Act. It is clear that the claimant in this case is not seised of any lands or tenements of freehold, copyhold, or other tenure within the earlier part of the 5th section of the Representation of the People Act; and the question therefore is, whether the claimant is a lessee or assignee, within the meaning of the latter part of the section. No doubt he has a term in a tenement, but it is not in a corporeal hereditament, nor one which could be the subject of occupation, in the sense in which that word is used in the Reform Act. In no sense is he lessee of the term, for he has no landlord; and though he is in one sense an assignee, since whatever is granted to a person may be said to be assigned, yet I think in the Act it means one who is the assignee of a lease. This appears from the expression used, assignee of a term originally created for a period of not less than sixty years. I think, therefore, that the claimant cannot be entitled under any of the clauses of the 5th section of the Representation of the People Act, 1867, and that the decision of the revising barrister must be reversed.

WILLES, J. I am of the same opinion. If the 5th section of the Representation of the People Act, 1867, were read by itself, and no light was thrown on it from any other source, I should be inclined to think that the person who framed it intended by the latter half of it to express generally, that for the purpose of the franchise it should be considered that being possessed of an interest originally created for a long term of years should be equivalent to being seised of a freehold, except that the value

1870

WARBURTON v. OVERSEERS OF DENTON.

required to qualify for a vote should be greater; and that the use of the words "lessee" and "assignee" was not intended to limit the persons who were entitled, or the sort of tenement to which they were entitled, but were introduced for the purpose of enumerating all the persons who occurred to the mind of the framer of the section as likely to come within it. It is clear, however, if that construction were put upon the Act, it would be a construction which would sacrifice the more precise and accurate meaning of the words to the supposed meaning of the legislature, which in that view would not have been expressed strictly, though sufficiently to convey their intention.

On the other hand there is, however, to be considered not merely the language of the section itself, but the history of the enactments by which persons became entitled to vote for a county in respect of a chattel interest. Referring to the Reform Act (2 Wm. 4, c. 45), we see that this enactment is not new, but to be found there in the same terms, except that in that Act there is, superadded to the section, a limitation which contains illustrations of what is meant by the legislature, and which plainly shews that the object of the legislature was not to give a right of voting to persons who only had a chattel rent-charge. To shew this it is only necessary to take the second alternative given in s. 20 of the Reform Act (2 Wm. 4, c. 45), which is, "or who shall occupy as tenant any lands or tenements for which he shall be bonâ fide liable to a yearly rent of not less than 50*l.*" Here the words "lessee" and "assignee" are dropped, and the word "tenant" introduced; it is obvious, then, that the Act is speaking of tenements capable of occupation by persons as tenants, i.e., of land or other such tenements, not of an incorporeal tenement like a rent-charge. This is rendered still clearer by the proviso at the close of the section, which is not found in the Act of 1867: "Provided always that no person, being only a sub-lessee or the assignee of any under-lease, shall have a right to vote in such election in respect of any such term of sixty years or twenty years, as aforesaid, unless he shall be in the actual occupation of the premises." Nothing could be more clear to shew that the tenements referred to in the 20th section of the Reform Act were tenements with respect to which there might be an under-lease and occupation. With the light thrown on the

5th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), by the fact that it is taken in terms and words from the 20th section of the Reform Act, and by the practice of the revising barristers' courts since the Reform Act, which, as far as I know, has been not to treat chattel rent-charges as conferring a vote, I arrive at the conclusion that the words "lessee" and "assignee" in the section were not introduced as an imperfect attempt to enumerate all the means by which a person might become entitled to a term in a tenement, but were intended to limit, and do limit, the persons who are entitled to vote. It may be that the assignee of such a rent-charge would come within the express terms of the section, but he would not be entitled, as assignee, to such an interest as would have entitled his assignor to vote, and he would not, therefore, be entitled to vote, on the ground nemo dat quod non habet.

KEATING, J. I am of the same opinion, though with some reluctance. I was in hopes the decision of the revising barrister might have been supported on the ground that the claimant being entitled to a tenement of sufficient value, he might be considered an assignee within the meaning of the section. But I am satisfied, now, that it is not the object of the section to alter the subject-matter in which the voter was required to have an interest according to the provisions of the Reform Act; and undoubtedly the construction put on the 20th section of that Act did limit the word "lessee" to the lessee of corporeal hereditaments, and the word "assignee" to an assignee of a lease in such a tenement. In other words, the effect of the 5th section of the Representation of the People Act, 1867, seems to be simply to reduce the required value of the tenement from 10*l.* to 5*l.*, without at all altering the nature of the qualification which would confer the franchise. I think under the circumstances we must, in the construction of the later statute, confine the words "lessee" and "assignee" in the same way in which they have been confined in the construction of the original statute. I think, therefore, the decision of the revising barrister should be reversed.

BRETT, J. I had very great doubts on this case for some time. I confess I was startled at the idea that though the lessee of an

1870

WARBURTON v. OVERSEERS OF DENTON.

interest so like this, that it would be difficult to point out any practical difference, was entitled to vote, yet the lessee of this interest was not; and I at first thought that since the section spoke of being entitled *as* lessee, it might refer to persons who were entitled in a manner similar to lessees. I cannot doubt, however, that the interest described in s. 5 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102) is the same as that mentioned in the Reform Act; the first part of the section uses the terms of the 19th section of the Reform Act, and the latter part the very words of the 20th section; it appears clear, therefore, that the only effect of the new section is to reduce the value of the tenement required to confer the franchise. The question, therefore, comes to be whether the interest of the claimant was such as would have come within the 20th section of the Reform Act. Now looking at this interest and comparing it with those mentioned in that section, I come to the conclusion that that section was only meant to refer to leases of corporeal tenements, and coming to that conclusion for the reasons stated by my Brother Willes, I do not think that the interest of the claimant would come within it; and from my experience I should say it had never been attempted till now to bring within the Reform Act such an interest as this. I think, therefore, the revising barrister's decision must be reversed.

Decision reversed.

Attorneys for appellant: *Horne & Hunter.*

Nov. 22.

MATHER, APPELLANT; THE OVERSEERS OF THE PARISH OF ALLENDALE, RESPONDENTS.

Parliament—County Vote—List of 12*l. Occupiers—Inaccuracy of Heading—Amendment—*6 *Vict. c.* 18, *ss.* 40, 101—30 *&* 31 *Vict. c.* 102, *s.* 30—31 *&* 32 *Vict. c.* 58, *s.* 19.

C. was entitled to be and was placed by the overseers upon the list of persons qualified to vote for the county by reason of the occupation of lands or tenements of the rateable value of 12*l.* or upwards per annum, prepared by them in pursuance of 30 & 31 Vict. c. 102, s. 30, and 31 & 32 Vict. c. 58, s. 19. This list, which was headed "Voters as occupiers of rateable value of 12*l.* or upwards," was printed alphabetically after the list of persons entitled to vote in respect of property in the parish, and was signed at the end by the overseers: but the

printer, by mistake, on the sheet which commenced with C.'s name, inserted the heading applicable to the preceding list, viz. "list of persons entitled to vote in respect of *property*." The overseers published the list as printed. There was no evidence that any person had in fact been misled.

The revising barrister decided that there had not been a publication of the list as a 12*l.* list, and that the interpolated heading was not "a misnomer of a thing so denominated as to be commonly understood," within the meaning of s. 101; and he therefore expunged the name of C. and all the names which followed his upon the list.

The Court, on appeal, reversed his decision; and held that there had been a sufficient publication of this part of the list as a 12*l.* list.

APPEAL from the Revising Barrister for the southern division of the county of Northumberland.

The name of John Clemitson appeared upon one of the lists under the circumstances hereinafter mentioned. No objection was made to Clemitson's right to vote.

Clemitson was entitled to be placed by the overseers upon the list of persons qualified to vote by reason of the occupation of lands or tenements of the rateable value of 12*l.* or upwards per annum: and the revising barrister found as a fact that Clemitson was not upon the register of voters for the previous year, nor entitled to vote otherwise than as an occupier of lands or tenements of the rateable value of 12*l.* or upwards per annum. His name was so placed upon the written list of 12*l.* occupiers sent by the overseers.

The lists as sent to the printer consisted,—1, of a copy of the old register, containing an alphabetical list of persons entitled to vote in respect of property situate in the parish; 2, of an alphabetical list of 12*l.* occupiers, with the signatures of the overseers at the end. The first of these was headed, "The list of persons entitled to vote in the election of knights of the shire for the southern division of the county of Northumberland, in respect of property situate in the parish of Allendale," and filled sheets 1 and 2 and a portion of sheet 3 of the printed list. The second commenced near the bottom of sheet 3, and was headed, "No. 4. Voters as occupiers of rateable value of 12*l.* or upwards (per overseers' return)," and continued in alphabetical order over sheets 4 and 5, the name of Joseph Chester standing last at the bottom of sheet 3, and Clemitson's name standing first at the top of sheet 4. The printer, by mistake, repeated upon sheets 4 and 5 the heading

187

MATHER v. OVERSEERS OF ALLENDALE.

of the first list, instead of that of the second list; and the lists so printed were inadvertently published by the overseers, with the heading thus erroneously interpolated plainly visible.

The sheets were fixed in the places of publication one upon the other, No. 1 being outermost, and the others following in the order of number; and they were attached together by the left upper corner, so that, to a person turning over the upper to look at the lower sheets, no portion of the heading would be covered. There was no evidence to shew whether any person had in fact been deceived by the publication of the name of Clemitson upon the lists in manner aforesaid. The names of 180 other persons, whose names were set out in a schedule, were put by the overseers upon the same lists, and under the same circumstances.

It was argued by the appellant,—first, that the list upon which Clemitson's name stood was primâ facie a good list of persons entitled to vote according to the terms of the heading, and that, no objection having been taken, the revising barrister had no power to expunge the name; secondly, that the publication of the name "John Clemitson" upon a list so headed and fixed as aforesaid was a good and sufficient publication of the name of John Clemitson as upon the separate list of voters entitled by reason of the occupation of lands or tenements of the rateable value of 12*l.* or upwards per annum, and that the heading so interpolated as aforesaid was a "mistake" within the meaning of 6 Vict. c. 18, s. 40, which the revising barrister had power to amend, and ought to have been amended by striking it out as surplusage; thirdly, that the heading so interpolated was "a misnomer of a thing so denominated as to be commonly understood," within the meaning of s. 101.

The revising barrister decided,—first, that the putting of Clemitson's name upon a list so headed as aforesaid was a "mistake," within the meaning of 6 Vict. c. 18, s. 40, which he had power to correct, although no objection had been made to the name; secondly, that the publication under such heading as aforesaid was not a good and sufficient publication of the name as of such separate list of 12*l.* occupiers, but was positively misleading, and that he had no power to reject the heading as surplusage; thirdly, that the heading so interpolated was not "a misnomer of a thing

so denominated as to be commonly understood," within the meaning of s. 101. He therefore expunged the names of Clemitson and of the 180 other persons from the list, and consolidated the appeals.

If the Court should be of opinion that this decision was wrong, the register was to be amended by inserting the names of John Clemitson and the 180 other persons in the list.

Udall, for the appellant. Section 30 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), requires the overseers to make out a list of persons entitled to the 12*l.* occupation franchise in counties, in the manner, as nearly as circumstances admit, in which they are required by the Registration Acts to make out the list of 10*l.* occupation voters in boroughs; and s. 19 of 31 & 32 Vict. c. 58 enacts that the names of the 12*l.* occupation voters for counties are to appear in a separate list after the list of voters in the parish otherwise qualified, and that such separate list is to be deemed to be part of the lists of county voters. Here, a proper list was sent to the printer, consisting of two parts, each appropriately headed; but he, by mistake, instead of repeating at the top of the fourth sheet the heading which properly belonged to the list of 12*l.* occupiers, inserted in that and in the fifth sheet the heading applicable to persons entitled to vote in respect of a property qualification. But, inasmuch as the list in which this mistaken interpolation occurs is alphabetical, and the signatures of the overseers appear at the end of it, there is no pretence for holding that any person could have been misled by it; and there was no evidence that any one had in fact been misled; therefore, the error was one which the revising barrister might and ought to have amended, under s. 40 of the Registration Act (6 Vict. c. 18). No heading at all was needed to sheets 4 and 5; it was mere surplusage. *Elliott* v. *St. Mary Carlisle* (1) shews that the heading is under the control of the revising barrister, and may be corrected by him if inaccurate. At all events, the description was such as must have been "commonly understood," that is, a description which any man of ordinary capacity could not fail to understand.

(1) 4 C. B. 76.

1870

MATHER v. OVERSEERS OF ALLENDALE.

[BRETT, J. Is the revising barrister's refusal to amend the proper subject of an appeal under s. 42 of 6 Vict. c. 18?]

The revising barrister here has found the facts, and he submits the propriety of his decision in point of law thereon to the Court.

The respondents did not appear.

BOVILL, C.J. By s. 19 of 31 & 32 Vict. c. 58, the overseers are required to put the names of 12*l.* occupiers in a separate list after the list of persons otherwise qualified. In this case the printed lists contained the names of persons entitled to vote in respect of property in the parish, in alphabetical order, and then came an alphabetical list commencing in the middle of sheet 3, which list was headed "No. 4. Voters as occupiers of rateable value of 12*l.* or upwards. Per overseers' return." This last-mentioned list had the name of one Chester at the bottom of sheet 3, and sheet 4 commenced with the name of Clemitson, and continued on in regular order to the last letter of the alphabet at the bottom of sheet 5. There is, therefore, a complete list of 12*l.* occupiers, in accordance with the statute. But at the head of sheets 4 and 5 there is this heading, "The list of persons entitled to vote in the election of knights of the shire for the southern division of the county of Northumberland, in respect of property situate in the parish of Allendale." This general heading may include those who are entitled to vote as the occupiers of property of the annual value of 12*l.* It does not contradict the special heading or make the alphabetical list of 12*l.* occupiers, which s. 19 says shall be a separate list, and shall be deemed to be part of the lists of county voters, inconsistent or unintelligible. It seems to me that the heading thus put to each sheet is so near a compliance with the Act as to prevent any person from being misled by it. If there be anything wrong in it, it was clearly a mistake of the printer which the revising barrister was bound to correct in pursuance of s. 40 of 6 Vict. c. 18. It does not seem to me to come within s. 101, which provides that "no misnomer or inaccurate description of any person, place, or thing named or described in any list or register of voters, shall in any wise prevent or abridge the operation of this Act with respect to such person, place, or thing, provided that such person, place, or

thing shall be so denominated in such list as to be commonly understood." If the thing be so denominated as to be commonly understood, no amendment would be necessary. The revising barrister here decided that the heading so interpolated was not a misnomer of a thing so denominated as to be commonly understood; but that is a matter which he has submitted to us; and I am of opinion that, taking the whole of this list together, it would be commonly understood to be a list of persons entitled to vote in respect of the 12*l.* occupation franchise; and that the conclusion to which the revising barrister came was wrong, and his decision ought to be reversed.

WILLES, J. I am of the same opinion. It appears to me, as far as I am able to form a judgment on the matter, that the list in question is perfectly intelligible and perfectly accurate. The objection is, that, whereas the legislature has required the overseers to make out a separate list of a species of persons entitled to vote for the county under the Representation of the People Act, 1867, viz. of 12*l.* occupiers, they have not made out such a list including the name of John Clemitson, and therefore John Clemitson's name ought not to be put upon the register, and so he is to be denied the franchise. The revising barrister's reason for supposing that the overseers have not made out such a list is, that, though they have in fact made out a list of "voters as occupiers of rateable value of 12*l.* or upwards," yet in that list, immediately preceding the name of John Clemitson, there is a heading containing a description of persons entitled to vote which description excludes the notion of its relating to the species of voters to which John Clemitson belongs, and, as John Clemitson's name comes after that description, he and those who follow him in alphabetical order upon that list are cut off from the preceding part of the list which ends with the name of Joseph Chester. Now, to judge whether that is right or wrong, we must look at the description contained in the heading of sheet 4. It is, "The list of persons entitled to vote in the election of knights of the shire, &c., in respect of property in the parish of Allendale." To my mind that represents, not any particular species of voters, but the genus under which falls the species of voters to which those belong who

1870

MATHER v. OVERSEERS OF ALLENDALE.

claim the franchise as 12*l.* occupiers. Consequently, in my opinion, the notion that the heading of sheet 4 represents another species, and is inconsistent with the earlier description of such species, and cuts it off from it, is a notion which is founded upon a mistake of fact, or on the solecism that genus does not include species. In truth, the insertion of the heading on sheets 4 and 5 was a mere mistake of the printer, in putting in that which is a description of the genus within which the species falls. The best way to test this is that which is suggested by my brother Keating in *Birks* v. *Allison* (1), where he says, with reference to s. 20 of the Reform Act, "The object of this statute, and more especially of this provision in it, was, to enable a man's neighbour to ascertain by inquiry whether or not he has the qualification which appears on the register." Apply that here. What would a person do who wished to ascertain whether John Clemitson was inserted in the list of those qualified to vote as 12*l.* occupiers? He would naturally turn over the lists till he came to the heading applicable to "voters as occupiers of rateable value of 12*l.* or upwards;" and, when he came to the name of Chester at the bottom of sheet 3, he would turn over the leaf, and there he would find the names continued in alphabetical order, beginning with Clemitson. Could any one suppose that he would read the heading of sheet 4, and disregard the alphabetical arrangement of the names which follow it? As well might a person reading a book be expected to read the heading of each page. To one of ordinary understanding the thing is perfectly plain. It seems to me that the heading was accurate enough; and, if inaccurate, it might be rejected. The objection taken by the revising barrister is over-refined, and cannot be sustained.

KEATING, J. I am of the same opinion. The revising barrister held, in the first place, that the interpolation of the heading to sheet 4 was a mistake which he had power under s. 40 of 6 Vict. c. 18, to correct. If it was a mistake, I agree that he had power to amend it; and I think he ought to have done so. But, it seems, he declined to exercise the power, because he conceived that the interpolation caused the description in the list not to be

(1) 13 C. B. (N.S.) 12; 32 L. J. (C.P.) 51.

commonly understood, and to be likely to mislead, and so there was no proper publication of the list. He held that to be a matter appearing on the face of the document, and has referred to us the question whether upon the face of it that was a misleading description, or one which could not be commonly understood. I agree with my Lord and my Brother Willes that there is nothing on the face of the list which was calculated to mislead any reasonable man. All the persons whose names appeared on the list were persons entitled to vote in respect of property situate in the parish of Allendale. If the heading which was interpolated at the top of sheet 4 had contained anything which could be called a contradiction of the heading of the separate list of 12*l.* occupiers in sheet 3, it seems to me there would be much in favour of the view taken by the revising barrister. But there is nothing inconsistent or contradictory in it. It is mere surplusage. For the reasons pointed out by my Brother Willes, I come to the conclusion that, upon the face of the document, it sufficiently appears that no person of reasonable understanding could have been misled, and that the revising barrister might and ought to have amended the mistake.

BRETT, J. There are two questions presented to us in this case,—first, whether there was any mistake in the heading to sheet 4 of the list of voters for the parish of Allendale; secondly, if there was, whether it was one of so grave a character as to vitiate the list, and prevent amendment. As to the first point: the list in question is made out under s. 30 of 30 & 31 Vict. c. 102, which says that the overseers shall make out a list of persons on whom the right of voting for a county is conferred in respect of occupation, in the same manner, and subject to the same regulations, as overseers are required by the Registration Act to make out lists of borough voters; and s. 19 of 31 & 32 Vict. c. 58 provides that the names of such county voters as are entitled to the franchise in respect of occupation shall appear in a separate list, which is to be deemed to be part of the lists of county voters of the parish. Under these two statutes, the list of the county 12*l.* occupiers is to be a separate list, and made out in the same manner as the list of borough voters under 6 Vict. c. 18, that is, according to the

1870

MATHER v. OVERSEERS OF ALLENDALE.

form given in the schedule B. No. 3, the heading of which is "The list of persons entitled to vote in the election of a member [*or* members] for the city [*or* borough] of ——, in respect of property occupied within the parish [*or* township] of ——," &c. It seems to me to follow, therefore, that the proper heading of the list in question would be "The list of persons entitled to vote in the election of knights of the shire for the southern division of the county of Northumberland, in respect of property occupied within the parish of Allendale." The lists, when sent to the printer, were properly headed. He, however, by mistake interpolated in the middle of the separate list of 12*l.* occupiers the heading which was applicable to the freehold or other qualifications for the county franchise, thus, at first sight, seeming to make the one list into two lists. I think it cannot be said that the list as it stands is strictly correct. It was clearly an error; and the question is to what extent does that error go? I must confess I should have thought it such an error as is described in s. 101 of the Registration Act. It was an inaccurate description of the qualification of those persons whose names follow on the list. Seeing that the names commencing in the middle of sheet 3 run on in alphabetical order through sheets 4 and 5, I think this inaccuracy of description of the qualification could not have misled any reasonably careful person. It may be, under s. 101, that no amendment was necessary; but it seems to me that, where there is such an error or inaccuracy, though such as could not mislead, the revising barrister ought to correct it under s. 40. The appeal given by s. 42 is against "any decision of any revising barrister on any point of law material to the result of the case." It is necessary, therefore, to see what is the question which is left to us. The revising barrister, after stating the facts, goes on to say that he decided that the putting of Clemitson's name upon a list so headed as aforesaid was a mistake which he had power to correct under s. 40, but that the publication under such a heading was not a good publication, but was misleading, and that the heading so interpolated could not be rejected as surplusage; and accordingly he expunged the names of Clemitson and 180 other persons from the list. In so deciding, I apprehend the revising barrister was wrong in point of law; and that, when he expunged the names of those persons from the list,

he wrongfully did so: and I think the question is properly brought before us, and that we may and ought to reverse his decision.

Decision reversed.

Attorneys for appellant: *Pattison, Wigg, & Co., for Mather & Cockcroft, Newcastle-upon-Tyne.*

NICHOLLS, APPELLANT; BULWER, RESPONDENT.

Nov. 22.

Parliament—County Vote—Description of Qualification—"Freehold Rent-charge accruing out of Freehold Houses"—Amendment under 6 *Vict. c.* 18, *s.* 40.

In the list of claims to vote for a county, the qualification of the claimant was described "Freehold rent-charge of 16*l.* per annum accruing out of freehold houses." The proof in support of the claim was that the claimant was owner in fee of the land on which stood four houses, which he had let on lease for a long term at 16*l.* per annum:—

Held (Willes, J., doubting), that this was not an insufficient or inaccurate description of the nature of the qualification, but a misdescription which the revising barrister had no power to amend under s. 40 of 6 Vict. c. 18.

APPEAL from the Revising Barrister for the southern division of the county of Essex.

The name of the appellant was on the list of claimants in respect of property in West Ham. The entries in the third and fourth columns, which were in accordance with the claim sent in to the overseers, were as follows:—

Nature of Qualification.	Street, lane, or other like place in this parish, and number of house (if any), where the property is situate, or name of the property and name of the tenant; or, if the qualification consists of a rent-charge, then the names of the owners of the property out of which such rent is issuing, or some of them, and the situation of the property.
Freehold rent-charge of 16*l.* per annum accruing out of freehold houses.	1, 2, 3, and 4, Stanley Cottages, Tower Hamlets Road.

The respondent objected to the name of the appellant being retained on the list.

It having been proved on the part of the objector that he had

1870

NICHOLLS v. BULWER.

duly given the notices required by the Acts of Parliament, the revising barrister called on the claimant to prove that he was entitled on the last day of July last past to have his name inserted in the list of voters in respect of the qualification described in the list. The claimant then produced and proved a deed of conveyance to himself in fee-simple of a plot of land, with four houses erected thereon, in the parish of West Ham, and stated that he had since the conveyance to him, and more than six months before the last day of July, let the land on lease for a long term of years at a yearly rent of 16*l*. The four houses built on the land were proved to be now known by the description appearing in the fourth column of the list. The lease was an ordinary building lease, with a reservation of rent in the usual manner, and with the usual covenants. The claimant had not parted with his reversion expectant on the determination of the term, nor had he dealt with his freehold estate in the land otherwise than by granting the said lease.

The claim had been sent in with the authority of the claimant; but it had not been signed or seen by him, and he did not know the description which had been given of his qualification until he saw the claim in court. The revising barrister had no evidence before him as to whether the person who made out the claim on behalf of the claimant knew what his qualification really was, and described it as a rent-charge by mistake, or whether he had been misinformed as to what the qualification was.

The revising barrister held, upon the authority of *Davies* v. *Hopkins* (1), that, as the claim had been published by the overseers, it was immaterial that it had not been signed; and this point was conceded by the objector. It was, however, contended on the part of the objector that the claim should have been for "freehold houses," and that it did not appear that the claimant had a rent-charge, as described in the list, the rent reserved under the lease being a rent-service.

On the part of the claimant it was admitted that he had not a rent-charge strictly so called: but it was contended that the description in the list sufficiently described the qualification proved; and the omission of any owner's name in the fourth

(1) 3 C. B. (N.S.) 376; 27 L. J. (C.P.) 6.

column was relied on to shew that the claim was not a claim in respect of a rent-charge strictly so called. Further, it was contended that the description might be amended; and the revising barrister was asked to amend by striking out all the words in the third column except "freehold houses."

The revising barrister was of opinion upon the evidence that it had not been proved that the claimant had a rent-charge. He was satisfied that the claimant had, subject to the requirements of the statutes as to registration, a good qualification to vote in respect of his freehold estate in the land and houses. He considered, however, that he could not retain the name, unless that qualification was the qualification described in the list. He thought that, as the description in the third column of the list was a particular description in legal language of a specific freehold interest in the land in question, such as would, if the claimant had possessed it, have given him a vote, he was bound, as matter of law, to construe the description as a description of that freehold interest, and of no other. He did not consider that this construction which he felt bound to place on the third column was affected by the omission of the owner's name in the fourth column.

He also came to the conclusion as a matter of fact that any ordinary person, not a lawyer, on reading the description given, would not suppose the claimant to be the freeholder, or, as he would say, the owner of the houses, but would suppose him to be possessed of a charge on houses belonging to some one else; and therefore, if there was a question on which the Court thought he ought to state his finding as one of fact, he found that the description in the list would not be commonly understood to mean that the claimant had that freehold interest in the houses which he really had. For this reason he thought that the description given in the third column of the list could not be considered to be, within the meaning of the 101st section of 6 Vict. c. 18, an inaccurate description, in the sense either of a clumsy or of a popular description of the nature of the qualification which the claimant really had. He also thought that, in consequence of the particularity of the description actually given of the nature of the claimant's qualification, he had not any power of amendment; and that, if he were to make the amendment asked, he should be

1870

NICHOLLS v. BULWER.

altering the description of the qualification otherwise than for the purpose of more clearly and accurately defining the same.

The revising barrister was guided in arriving at the conclusion that "freehold houses" and "freehold rent-charge" described qualifications of a different nature, within the meaning of the Registration Acts, to some extent by the note given to form No. 2 in sched. H. to 2 Wm. 4, c. 45, which directs claimants to describe the nature of their qualifications either as "freehold houses" or as "freehold rent-charge," as the case might be.

No other amendment was asked for except that above mentioned. Each party stated his intention of appealing against the decision, if adverse to him, in order, if possible, to obtain the opinion of this Court upon the true legal construction of the proviso in s. 40 of 6 Vict. c. 18 restricting a revising barrister from changing the description of the qualification, except for the purpose of more clearly and accurately defining the same.

The revising barrister decided, for the reasons stated above, to make no amendment, but to expunge the name; and he expunged it accordingly.

The questions for the opinion of the Court were:—1. Whether the qualification proved was the qualification described in the list; 2. Whether the amendment asked for, or any and what amendment, could have been made. If the Court should be of opinion that the revising barrister was right in law in deciding to expunge the name, the register was to remain as it stood: but if the Court should be of opinion that he was wrong in law, and that the name of the appellant ought to have been retained, either with the description of the nature of his qualification as given in the list, or with any amended description, then the register was to be amended by inserting the name of Nicholls, with such description of the qualification as the Court should direct.

E. Clark, for the appellant. The qualification which the claimant proved was not of a different nature from that stated in the list: both are freeholds within 8 Hen. 6, c. 7. Not knowing the distinction between a rent-charge and rent-service, the claimant has used clumsy and inappropriate words to describe the interest which he has; and it was within the competency of the revising barrister

to amend the description under 6 Vict. c. 18, s. 40. In *Jones* v. *Jones* (1), a claim was made to be registered as a county voter in respect of a "leasehold house and garden," and it appeared that the claimant was possessed of a lease for life, and, if he died within sixty years, then for the remainder of the term of sixty years; and the description was held sufficient, though strictly speaking the interest was a freehold. And Byles, J., said (2): "I think we should be doing what would be very dangerous, if we were to require illiterate persons to insert in their notices a strictly legal description of their qualifications; it would oblige them always to employ a solicitor before giving a notice of objection or making a claim to vote." In *Birks* v. *Allison* (3), the voter claimed to be registered for the county as an occupying tenant at 50*l.* rent. The description of his qualification in the third column of the list was "Tenant;" and the revising barrister held it to be commonly understood as designating a tenant occupying at a rent; but that, for more clearly and accurately defining the qualification, he had power to amend by making it "Farm, as occupying tenant;" and that course was approved by the Court. That case and *Hitchins* v. *Brown* (4) and *Howitt* v. *Stephens* (5) shew that the third and fourth columns are to be taken together; and the absence of an owner's name in the fourth column in this case is a sufficient indication that the claimant is the owner.

[WILLES, J. If you strike out the word "charge," you have a nearly accurate description of the claimant's interest. The reversioner here might have severed the rent from the reversion and left it dry. *Dodds* v. *Thompson* (6) shews that a rent-charge is a freehold tenement within 8 Hen. 6, c. 7.

KEATING, J. Sched. H. No. 2, to the Reform Act, seems to treat them as different. The nature of the qualification is to be described, as "Freehold house, *or* warehouse, stable, land, field, annuity, rent-charge, &c., as the case may be, giving such a description of the property as may serve to identify it." "Rent-charge" would hardly be satisfied by proof of a freehold interest in land.]

(1) Law Rep. 4 C. P. 422.
(2) Law Rep. 4 C. P. at p. 425.
(3) 13 C. B. (N.S.) 12; 32 L. J. (C.P.) 51.
(4) 2 C. B. 25; 15 L. J. (C.P.) 38.
(5) 5 C. B. (N.S.) 30; 28 L. J. (C.P.) 105.
(6) Law Rep. 1 C. P. 133.

1870

NICHOLLS v. BULWER.

"Freehold" is the governing word. In *Daniel* v. *Coulsting* (1), a qualification for a borough vote was described as "house," and it was held sufficient, the building being capable of being used as a dwelling-house, though not in fact used as such.

[WILLES, J. Suppose the thing were described as an "annuity," which was in fact a "rent-charge"? The distinction between them cannot be said to be abolished since the case of *Monypenny* v. *Monypenny* (2), where Lord St. Leonards went very much at large into the matter. The writ of annuity was not abolished at the time the Reform Act passed.]

No doubt, the claimant was wrong in calling this a "rent-charge;" but the question is whether, taking the third and fourth columns together, ample means are not afforded for enabling any person to ascertain the existence of the claimant's right.

Shield, for the respondent. This is not a mere insufficient or inaccurate description of the nature of the claimant's qualification. It is a description of a qualification totally different from that which he really had: and the revising barrister had no power under s. 40 of 6 Vict. c. 18 to amend or alter it. If, as has been suggested, the word "charge" had been omitted, possibly the description might have been sufficient, or might have been cured by an amendment. But here the claimant uses a phrase which has a precise known meaning, and one which the legislature has sanctioned: and the proviso in s. 40 is express, that, whether any person shall be objected to or not, no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be; nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." This is no inaccurate description of the claimant's qualification. To say that a man has a rent-charge issuing out of freehold houses, is only another way of stating that he has not such an interest as the claimant was proved to have. If he had the fee, the rent-charge would be merged and destroyed: the two could not co-exist in the same person.

[WILLES, J. Might he not have a legal interest in the one and an equitable interest in the other?]

(1) 7 M. & G. 122. (2) 9 H. L. C. 114; 31 L. J. (Ch.) 269.

The description of the qualification here does not give such information as to direct an inquirer to the proper source of information. It may be that you may pray in aid the statements in the fourth column to correct an imperfect description in the third: but, under no circumstances can the fourth column be had recourse to for the purpose of obviating a misdescription in the third; at most it can only supplement a defective description.

[KEATING, J. The more recent legislation on the subject would seem to require that each column should be perfect in itself; see 28 & 29 Vict. c. 36, s. 6, sched. A. No. 2.]

There are many cases to shew that an amendment can only be allowed for the purpose of correcting an inaccurate description of the qualification, not for the purpose of substituting a new one: see *Bartlett* v. *Gibbs* (1); *Hitchins* v. *Brown* (2); *Onions* v. *Bowdler*. (3)

Clark, in reply.

BOVILL, C.J. It seems to me that the object of the Acts of Parliament was, that, where a person makes a claim to the franchise, he shall describe the nature of his qualification in such terms as to enable the revising barrister to judge of its sufficiency. The 40th section of 6 Vict. c. 18 empowers the revising barrister to amend the description of the qualification, where in his judgment it is insufficiently described for the purpose of being identified, if the matter so insufficiently described is supplied to his satisfaction before he shall have completed the revision of the list; and there is an express proviso in that part of the section that "no evidence shall be given of any other qualification than that which is described in the list of voters or claim, as the case may be, nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same." The qualification of the claimant here, under the head "nature of qualification" in the list, is stated to be "Freehold rent-charge of 16*l.* per annum accruing out of freehold houses." There is no ambiguity or uncertainty in this description. The claimant puts forth a qualification which is not only good in itself but sufficiently described. The revising

(1) 5 M. & G. 81. (2) 2 C. B. 25; 15 L. J. (C.P.) 38.
(3) 5 C. B. 65; 17 L. J. (C.P.) 70.

1870

NICHOLLS v. BULWER.

barrister could do no otherwise than treat it as a sufficient qualification. Is there, then, any difference between a "freehold rent-charge" and "freehold land," for the purpose of registration? For very many years, the distinction has been perfectly familiar to every one. Under 3 Geo. 3, c. 24, to entitle a man to vote in respect of a rent-charge, it must have been registered for twelve months. Rent-charges are recognized in the Act we now have to construe (6 Vict. c. 18), as constituting a peculiar description of franchise. The 72nd section repeals 3 Geo. 3, c. 24: and in the heading of the fourth column in form No. 2 in sched. A., which is the notice published by the overseers pursuant to s. 4, are these words:—"If the qualification consist of a rent-charge, then [insert] the names of the owners of the property out of which such rent is issuing, or some of them, and the situation of the property;" and the form of the list of claimants numbered 3 in the same schedule contains the same direction. When, therefore, we consider that a freehold rent-charge was a thing well known to the law, and down to the passing of 6 Vict. c. 18 was required to be registered, and when we find the statute deals with them in the way I have mentioned, it appears to me that the legislature did contemplate a "rent-charge" as being a qualification altogether different from the ownership of the land. The only ground upon which it can be suggested that a freehold rent-charge stands upon the same footing as freehold land, is, that the right of voting in respect of each depends upon the statute of 8 Hen. 6, c. 7: but if it may be said that the one may be substituted for the other, it may with equal plausibility be said that, where a claimant describes his qualification as "freehold house," and it turns out that he has a "freehold marsh," the revising barrister would be justified in altering the description. The qualification in respect of which this claimant sought to be registered was correctly described. The only objection was that the proof did not support the claim; it appearing that the claimant was possessed, not of a "freehold rent-charge," but of "freehold houses." It seems to me not only that the revising barrister was not at liberty to amend that description, but that he was by s. 40 expressly prohibited from amending it, that is, from altering it, by inserting a different qualification. He is not to receive evidence of "any other quali-

fication than that which is described in the list of voters or claim," nor to "change the description of the qualification as it appears in the list,"—"except for the purpose of more clearly and accurately defining the same," that is, the qualification previously described. That might have enabled the revising barrister to complete an incomplete or inaccurate description of a rent-charge, but not to alter it to another qualification. The amendment here proposed would not have been giving a more accurate definition of the qualification stated in the list, but would have been altering the nature rather than the description of it. The authorities upon the subject are clear. I think the revising barrister was quite right in declining to amend, and that the appeal should be dismissed.

WILLES, J. But for the respect which I entertain for the opinions of my Lord and my two learned Brothers, I own I should have been disposed to come to a different conclusion, and to have thought that the description of the qualification might have been amended. When it is conceded that the description would have been sufficient if it had been "freehold *rent* issuing out of freehold houses," though it would certainly have been an inaccurate description, I cannot think the revising barrister was right in refusing to amend. Although that description would not have been strictly accurate, it would have disclosed an interest in respect of which the claimant would have a right to vote within 8 Hen. 6, c. 7; the substance of the thing would have been a freehold interest, and such as to be commonly understood, within s. 101 of 6 Vict. c. 18. This is an inaccuracy of a very venial description. I will not attempt to detract from the opinions expressed by my Lord and about to be expressed by the rest of the Court; but will content myself with observing that the case has been extremely well argued on both sides, but that the inclination of my mind is to concur with the argument of Mr. Clark.

KEATING, J. It seems to me that the revising barrister was right in refusing to amend, though, after the doubts expressed by my Brother Willes, I come to that conclusion with some hesitation. The qualification stated in the list, "Freehold rent-charge of 16*l.* per annum accruing out of freehold houses," is a perfect qualifica-

1870

NICHOLLS v. BULWER.

tion, and one well known to the law. There is no ambiguity in it; but the proof by which it was attempted to be supported shewed that the claimant had not a "rent-charge," but was the owner of freehold land. These are two perfectly separate and distinct qualifications; and, as has been pointed out by my Lord, the legislature seems to have so considered them. I do not look so much at the intention of the party, or to his ignorance of the nature of the thing he meant to describe, but rather at what the legislature attaches importance to for the purpose of enabling third persons to know what the nature of the claim is. Now, if it be matter of fact, the revising barrister finds (and in that I concur with him) that any ordinary person, not a lawyer, on reading the description given, would not suppose the claimant to be the freeholder, or the owner of the houses, but would suppose him to be possessed of a charge on houses belonging to some one else. No doubt a very slight alteration would make all the difference. Strike out the word "charge," and it might be a strictly legal description of the qualification which the claimant has: but it would only become so by striking out the word which makes the difference. I agree with my Brother Willes that we ought not to be astute to defeat claims to vote; and upon this ground it was that we decided, in *Jones* v. *Jones* (1), that a description of the qualification as "leasehold house and garden," was satisfied by proof that the claimant had a lease for life, and, if he died within sixty years, then for the remainder of sixty years, which in strictness is a freehold interest; because a person claiming the county franchise under 2 Wm. 4, c. 45, s. 20, might, according to the form given in sched. H. to that Act, state his qualification to be "Lease of house for years." But it appears to me that to allow an amendment in this case would be going much further: the proof tendered could not sustain the claim without altering the qualification as stated in the list. I think it is of the utmost importance that, whilst care is taken that the claims of voters should not be unduly fettered, equal care should be taken that the real qualification should be stated with sufficient certainty to enable objectors to know how to shape their objections. I therefore, though not without hesitation, come to the conclusion that the revising barrister was right.

(1) Law Rep. 4 C. P. 422.

BRETT, J. It seems to me that the qualifications in respect of a "rent-charge" and of a "freehold interest" in houses or land, are two different qualifications in point of fact. This difference is well known in election law, and is recognized in 6 Vict. c. 18, which points out in sched. A. Nos. 2 and 3 the different modes of describing the two, and for a sufficient reason, inasmuch as when 3 Geo. 3, c. 24, which required rent-charges to be registered for a given period in order to confer the right of voting, was repealed, it became necessary, when the qualification to vote was a rent-charge, that notice should be given of the names of the owners and the situation of the property out of which it was issuing, in order that an opportunity should be afforded for inquiry into the validity of the rent-charge. It seems to me that the description here given is a good claim for a "rent-charge," and not for a qualification in respect of freehold property. It is not such a description as would, under s. 101, be commonly understood to be a claim to be registered in respect of a freehold interest in land. It is a good description of a known qualification, and not an insufficient or inaccurate description of the qualification proved, and therefore the revising barrister had no power to make any amendment, or to retain the name of the claimant on the list. Though I at first entertained some doubt, yet, upon looking more closely into s. 40, I find that the power given to the revising barrister is, to "expunge the name of every person whose qualification as stated in any list shall be insufficient in law to entitle such person to vote." The present case does not fall within that part of the section, because the description is upon the face of it sufficient. The section goes on, or if "the nature or description of his qualification shall in the judgment of the revising barrister be insufficiently described for the purpose of being identified, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described be supplied to his satisfaction." This is not a qualification the nature of which is insufficiently described for the purpose of being identified. The present case does not fall within either of these parts of s. 40; and the proviso, that "no evidence shall be given of any other qualification than that which is described in the list of voters or claim, nor shall the barrister be at liberty to change the description of

1870

NICHOLLS v. BULWER.

the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same," so far from enlarging, rather limits the power of the revising barrister to amend. For these reasons, I agree with my Lord and my Brother Keating that the revising barrister was right in refusing to amend, and that his decision should be affirmed.

Decision affirmed.

Attorneys for appellant: *Houghton & Wragg.*
Attorneys for respondent: *Wyatt & Hoskins.*

1871

April 24.

ROLLESTON, APPELLANT; COPE, RESPONDENT.

Parliament—County Vote — Mortgage — Building Society — Monthly Payments for Principal, Interest, and Expenses—Yearly Value—8 *Hen.* 6, *c.* 7—28 *Geo.* 3, *c.* 36, *s.* 6—6 *Vict. c.* 18, *s.* 74.

A member of a benefit building society was possessed of freehold houses, which he had conveyed by way of mortgage to the society as security for an advance of 300*l.* By the terms of the deed and the rules of the society, he was bound, in order to redeem the property, to pay to the society, during a period of ten years from 1863, monthly instalments, for principal, interest, and expenses, which amounted in the whole to 41*l.* 8*s.* each year, two-thirds of which was in discharge of principal, and one-third in payment of interest; and, in case of certain defaults, a power of entry was reserved to the society. The interest, which was not more than 7 per cent. for the term, was capitalized, and added to the sum borrowed. The mortgagor had paid 350*l.*, and two years remained during which he still had to pay the monthly instalments; but he was entitled to redeem the property by a present payment of 73*l.* 1*s.* The annual value of the houses was 31*l.* 4*s.*:—

Held that, in ascertaining the yearly value of the estate to the mortgagor, the interest only was to be deducted, and not the payments made in reduction of the principal mortgage-debt, and consequently that the mortgagor had an estate of more than the yearly value of 40*s.* above all charges in respect of which he was entitled to a vote for the county.

Copland v. *Bartlett* (6 C. B. 18; 15 L. J. (C.P.) 50), and *Beamish* v. *Stoke* (11 C. B. 29; 21 L. J. (C.P.) 9), considered.

Robinson v. *Dunkley* (15 C. B. (N.S.) 478; 33 L. J. (C.P.) 57), followed.

APPEAL from the Revising Barrister for the southern division of the county of Leicester.

The respondent objected to the name of the appellant being

retained in the list of voters for the parish of St. Mary, in respect of "freehold houses" Nos. 71, 73, and 75, Asylum Street.

1. The appellant, or claimant, is a member of a building society, called "The Leicester Permanent Benefit Building Society," established under 6 & 7 Wm. 4, c. 32, the rules and regulations of which were to be taken as part of the case (1), in which society he held three shares.

2. In February, 1863, the claimant was possessed of three freehold tenements, and was desirous of borrowing 300*l.* in respect of his said three shares in the society; and, in consideration of the society advancing him that sum, he executed a mortgage in fee of the said freehold tenements to the society, to secure the subscriptions, payments, redemption-moneys, and fines in relation to the said sum of 300*l.*, by monthly instalments of 3*l.* 9*s.*, extending over a period of ten years; with a proviso for redemption upon the observance by the claimant during the ten years of the subscriptions, payments, redemption-moneys, and fines payable by him in respect of his three shares and of that advance, according to the rules of the society and the tables annexed to them; and when the 300*l.* and all other payments should have been satisfied by the claimant, the security was to be discharged in the mode prescribed. The mortgage-deed provided that, if during the above-mentioned period the mortgagor neglected for four consecutive calendar months to pay all the subscriptions and payments, and to perform the regulations which on his part as a shareholder and mortgagor were by the rules of the society directed to be paid and performed, the society might enter into possession of the premises, and sell and dispose of them.

3. The claimant has duly paid all the instalments due under the mortgage-deed, and has always been and now is in actual possession of the property.

4. The periodical payments made by the claimant have amounted to 350*l.* in the whole. The claimant has two years' annual payments still to make; but he may redeem the mortgaged property for a present payment of 73*l.* 1*s.*

5. The annual value of the freehold tenements is 31*l.* 4*s.*, and

(1) The rules of the society contained nothing that affected the decision of the case, beyond what appears in the case.

1871

ROLLESTON v. COPE.

the annual payment made to the society is 41*l.* 8*s.* This last-mentioned payment is made generally in reduction of the sum borrowed, and in discharge of the claimant's payments and subscriptions in accordance with the rules of the society.

6. The interest, which is not more than 7 per cent. for the term of years, is capitalized, and added to the sum borrowed.

7. The receipts given by the society to the claimant do not shew what sum is received for interest and what for principal; but, if the annual payments of 41*l.* 8*s.* were apportioned, two third parts would be paid in discharge of principal, and one third part in payment of the interest.

8. It was contended on behalf of the claimant that only so much of the annual payments as represented the interest on the loan, as in the case of a common mortgage, should be deducted from the annual value; and, if this were done, the claimant had a freehold of 40*s.* annual value in the said freehold houses.

9. It was contended on behalf of the objector that the whole of the payments to the society, on whatever account they were made, should be set off against the annual value of the property; and that, if this were done, the claimant had not a freehold of 40*s.* annual value in the tenements.

10. The revising barrister was of opinion that, in accordance with the decided cases, the whole amount of the payments to the society was a charge upon the estate, and should be deducted from the annual value thereof, and that such deductions reduced the value of the estate below 40*s.*; and he erased the name of the claimant from the list of voters.

11. The names of eighteen other persons, each of whom had obtained an advance from the above-mentioned benefit building society, or from some other society established pursuant to 6 & 7 Wm. 4, c. 32, of the amount, and for the term of years, and subject to the annual payments respectively mentioned in a schedule annexed to the case, under circumstances similar to those of the principal case, were in like manner erased from the list of voters; and the cases were consolidated.

If the Court should be of opinion that only so much of the annual payments as would represent the interest on the loan, as in the case of an ordinary mortgage, should be deducted from the

annual value of the claimants' property, the names of the several claimants were to be restored to the list of voters.

Jan. 20. *J. O. Griffits*, for the appellant. The decision of the revising barrister was wrong. He acted upon the cases of *Copland* v. *Bartlett* (1) and *Beamish* v. *Stoke* (2), where it was held that the whole of the payments made towards the redemption of the mortgage-debt, as well as those which were applicable to interest, were to be taken into account; and that, if these reduced the annual value of the estate to the mortgagor below 40*s*., he was not entitled to be registered. The subsequent case of *Robinson* v. *Dunkley* (3), however, lays down a different principle, viz. that a distinction is to be drawn between payments which are to go in reduction of principal and payments for interest, which latter only are to be set against the annual value: and this is in accordance with the provision in s. 74 of 6 Vict. c. 18. The mortgagor is the holder of a freehold estate. What is the value of that estate? In the ordinary case of a mortgage, which this is, the annual interest is the only charge upon the land. The payments on account of principal are for the benefit of the estate; they go to increase the security, not to diminish the value of the mortgagor's interest in the land. One mode of testing the value is,—what would the mortgagor's interest in the estate sell for? It is found that, if the appellant were to make a present payment of 73*l*. 1*s*., he would have an estate worth 31*l*. 4*s*. a year. *Moore* v. *Carisbrooke* (4) is an authority to shew that the monthly payments in these cases may be distributed. Besides, the question of value is one of fact; and, if so, the revising barrister has decided it, for he has found that the appellant is possessed of an estate of greater value than 40*s*. a year.

Quain, Q.C., for the respondent. The question reserved for the opinion of the Court is whether the whole amount of the monthly payments to the society formed a charge upon the estate which is to be deducted from the annual value thereof, or only so much of

(1) 6 C. B. 18; 18 L. J. (C.P.) 50.

(2) 11 C. B. 29; 21 L. J. (C.P.) 9.

(3) 15 C. B. (N.S.) 478; 33 L. J. (C.P.) 57.

(4) 12 C. B. 661; 22 L. J. (C.P.) 64.

1871

ROLLESTON v. COPE.

such payments as represent the interest upon the mortgage-debt. That question is decided by the cases of *Copland* v. *Bartlett* (1), *Lee* v. *Hutchinson* (2), and *Beamish* v. *Stoke* (3), unless those cases are overruled by the subsequent decision in *Robinson* v. *Dunkley*. (4) Taking the statute of 8 Hen. 6, c. 7, and the learned and admirable exposition of it by Maule, J., in the first two of those cases, it is quite clear that the right of voting for knights of the shire was intended to be conferred only upon those who possess freehold land out of which, above all charges, they may expend 40*s.* by the year. A man who is in the receipt of 31*l.* a year from land for which he has to pay 41*l.*, clearly has not 40*s.* by the year to expend. In *Hamilton* v. *Bass* (5) it was held that the cost of repairs is to be deducted in ascertaining the annual value of the freehold. *Robinson* v. *Dunkley* (4), so far as it goes, is certainly a decision in favour of the appellant. It is, however, to be observed that it was argued on one side only, and that the decision of the Court turned mainly upon the mode in which the facts were found by the revising barrister. *Moorhouse* v. *Gilbertson* (6) is a distinct authority in favour of the view taken by the revising barrister in this case.

Griffits, in reply, cited *Astbury* v. *Henderson*. (7)

Cur. adv. vult.

April 24. BOVILL, C.J. The claimant, being a member of and holding shares in a building society, was the owner and in possession of certain freehold houses, in respect of which he claimed to be on the register of county voters. These houses he had conveyed by way of mortgage to the society as security for 300*l.* advanced to him; and by the mortgage-deed, and the rules of the society, in order to redeem the property, he was bound to pay, during a period of ten years from 1863, monthly instalments of 3*l.* 9*s.*, which amounted to the sum of 41*l.* 8*s.* in each year; and, in case of certain defaults, the society might enter upon the houses.

(1) 6 C. B. 18; 18 L. J. (C.P.) 50.
(2) 8 C. B. 16; 20 L. J. (C.P.) 4.
(3) 11 C. B. 29; 21 L. J. (C.P.) 9.
(4) 15 C. B. (N.S.) 478; 33 L. J. (C.P.) 57.
(5) 12 C. B. 631; 22 L. J. (C.P.) 29.
(6) 14 C. B. 70; 23 L. J. (C.P.) 19.
(7) 15 C. B. 251; 24 L. J. (C.P.) 20.

At the time in question the claimant had paid 350*l.*, and two years remained during which he would have to pay the monthly instalments, or he might then have redeemed the property by a present payment of 73*l.* 1*s.* The annual value of the houses was 31*l.* 4*s.*

It was contended for the claimant that only such sum as would be equivalent to interest on the loan ought to be deducted from the annual value to the claimant.

The revising barrister was of opinion that the whole of the payments ought to be deducted, in accordance with two decisions of this Court; and he disallowed the claim to vote. The appellant relied upon another and later decision of this Court, which he contended overruled the two previous cases. The question submitted to us is, whether only so much of the annual payments as would represent interest on the loan should be deducted; and upon the result of our opinion on that point this appeal is made to depend.

The statute of 8 Hen. 6, c. 7, requires that the voter shall have "free land or tenement to the value of 40*s.* by the year at the least above all charges," and declares that "such as have the greatest number that may expend 40*s.* by the year and above shall be returned to parliament." The sheriff is also empowered to examine upon oath every voter "how much he may expend by the year;" and the Act declares that "he which cannot expend 40*s.* by the year as afore is said" shall not vote. The property, therefore, must be of the value of 40*s.* a year at the least above all charges within the meaning of that enactment.

The statute 28 Geo. 3, c. 36, s. 6, treats the interest of the voter as one which must be of the value of 40*s.* by the year over and above the interest of any mortgage upon the estate, and also above all outgoings payable in respect of the said estate.

Under the provisions of different statutes, and ultimately by the Registration Act of 6 Vict. c. 18, s. 74, a person who has mortgaged his estate, but continues in possession, is entitled to the franchise, though his equitable estate must be of the same value that would be requisite if he were still the owner of the legal estate: see *Copland* v. *Bartlett* (1) and *Barrow* v. *Buckmaster*. (2)

(1) 6 C. B. 18; 18 L. J. (C.P.) 50. (2) 12 C. B. 664; 22 L. J. (C.P.) 65.

1871

ROLLESTON v. COPE.

It has also been decided that expenses incurred in increasing the annual value must be deducted, because they are absolutely necessary in order to produce such value: such as the cost of manuring and cultivating land, and the maintenance and repair of houses and buildings: *Hamilton* v. *Bass* (1); the cost of collecting rents, when such an expense is found to be necessary: *Sherlock* v. *Steward* (2); and, where the property is let to a tenant, the amount of the tenant's rates, if and when the landlord has undertaken to pay them: *Moorhouse* v. *Gilbertson*. (3)

Other cases have been decided on the ground that the deductions sought to be made were charges within the meaning of the statute; such as a rent-charge:—*Copland* v. *Bartlett* (4), and the cases there cited by Mr. Badeley, and *Barrow* v. *Buckmaster* (5); the yearly interest secured by a mortgage: *Moore* v. *Carisbrooke* (6); and yearly interest actually paid by agreement, where the principal alone was secured by the mortgage: *Lee* v. *Hutchinson*. (7) The same rule, I apprehend, would apply to the case of annuities or other annual sums charged upon the property. But, in the case of an ordinary mortgage, it has never been supposed that the whole principal money must be deducted in the year when it is due or becomes payable.

There are also three important cases directly bearing upon the present question, and each of them decided with reference to building societies.

The first is the case of *Copland* v. *Bartlett* (4), where the claimant, being a member of a building society, had obtained a conveyance of the property, and had executed a mortgage to the trustees. The amount of the purchase-money secured was 65*l*., and the claimant was bound by the mortgage-deed to pay 15*s*. a month (equal to 9*l*. a year), whilst the annual value of the property was only 8*l*.; but, if only interest on the 65*l*. was to be deducted, there would have been a clear yearly value of 40*s*. The Court decided that these monthly payments were a charge

(1) 12 C. B. 631; 22 L. J. (C.P.) 29.
(2) 7 C. B. (N.S.) 21; 29 L. J. (C.P.) 87.
(3) 14 C. B. 70; 23 L. J. (C.P.) 19.
(4) 6 C. B. 18; 18 L. J. (C.P.) 50.
(5) 12 C. B. 664; 22 L. J. (C.P.) 65.
(6) 12 C. B. 661; 22 L. J. (C.P.) 64.
(7) 8 C. B. 16; 20 L. J. (C.P.) 4.

1871

ROLLESTON v. COPE.

upon the property, and that they must be taken into account in ascertaining the annual value; and, as they reduced the annual value below 40*s.*, the vote was disallowed.

The next case was *Beamish* v. *Stoke*. (1) The annual value of the property there was 6*l.*, and it was mortgaged to the trustees of the building society. The amount due upon the mortgage for principal was 47*l.* 10*s.* 3*d.*, and the payments which the claimant was bound to make of 4*s.* 6*d.* weekly on account of principal and interest amounted to 11*l.* 14*s.* per annum. This sum was apportioned by the secretary as follows, viz. 8*l.* 18*s.* in part liquidation of the principal of the mortgage-debt, 6*s.* for incidental expenses of working the society, and 2*l.* 10*s.* for premium or interest on the amount of principal remaining unpaid. It was not disputed that the 6*s.* and the 2*l.* 10*s.* should be deducted; and the only question submitted to the Court was whether the payments in part liquidation of the principal ought to be deducted, in ascertaining the annual value. The Court decided that the whole of these weekly payments constituted a charge upon the property, and must be deducted, notwithstanding a part of them was made for repayment of the principal.

The last of the three cases is *Robinson* v. *Dunkley* (2), which came before this Court in 1863. In that case the claimant, who was a member of a building society, had executed a mortgage to them. The amount advanced in the first instance was 73*l.*; and he was bound to make monthly payments amounting in the whole to 4*l.* per annum. On the 31st of January preceding the registration, he had paid the whole amount owing by him, with the exception of 2*l.* This sum would be payable by him by monthly payments during the following six months, and was in fact paid by the month of July. The revising barrister expressly found as a fact that, the 71*l.* having been paid before the 31st of January, and the remaining 2*l.* by July, the claimant had a freehold prior to the 31st of January of the value of 40*s.* per annum, and therefore he retained his name on the list of voters. This case was decided in favour of the respondent in the appeal.

(1) 11 C. B. 29; 21 L. J. (C.P.) 9.
(2) 15 C. B. (N.S.) 478; 33 L. J. (C.P.) 57.

1871

ROLLESTON v. COPE.

It was contended before us that this latter case was at variance with the previous decisions, and virtually overruled them. It is difficult to reconcile those decisions, and still more difficult to distinguish the present case in principle from *Robinson* v. *Dunkley*. (1)

The question is certainly involved in much doubt; and, but for the decision in the last case, I should have had no hesitation in acting, as the revising barrister has done in this case, upon the authority of *Copland* v. *Bartlett* (2) and *Beamish* v. *Stoke* (3), and upon the reasons of the very learned and eminent judges who decided those cases.

The later case, however, of *Robinson* v. *Dunkley* (1) having been decided, I think it is better to abide by that decision. There are also strong arguments in support of it; and, applying it to the present case, the result will be that the payments made by the claimant representing a greater value than 40*s*. a year, the decision of the revising barrister must be reversed, and the claim to vote allowed.

The question in these cases in future for the revising barrister to consider will be, whether, taking the payments which have been made for principal or purchase-money into account, and deducting the proper annual sums independently of the payments on account of principal, the claimant's interest in the property is of the value of 40*s*. by the year. If his interest in the property be found to be of that value, he will be entitled to the franchise; otherwise his claim to be placed on the list of voters must be disallowed.

WILLES, J. I am of the same opinion. This case ought to be decided according to the construction of the statutes and their application to the substantial interest of the mortgagor, not his legal as distinguished from equitable interest.

The statute of Hen. 6 would exclude him from the franchise, because of his not having the legal estate. The subsequent statutes have corrected this; and the effect of them is to treat

(1) 15 C. B. (N.S.) 478; 33 L. J. (C.P.) 57.
(2) 6 C. B. 18; 18 L. J. (C.P.) 50. (3) 11 C. B. 29; 21 L. J. (C.P.) 9.

the mortgagor as having the freehold, subject to a charge of the principal money, or so much as remains unpaid, and of the interest.

In an ordinary mortgage, payment of the principal may be enforced at any time after the day it falls due; but no regard is paid to that incumbrance, provided that the statute of Hen. 6 is in other respects satisfied.

To satisfy that statute, two conditions must be fulfilled:—First, the land must be freehold to the annual value of 40*s.* at the least, above all charges; in the original, "outre les reprises,"—a term never applied, that I can find, to a payment which redounds to the permanent benefit of the owner of the land, like building a house, or such like, but only to such payments as rent-charges, ordinary repairs, taxes, and, by analogy and statute, to interest, the payment of which once made is so much spent and gone, neither enjoyed by nor invested for the owner or mortgagor:—Secondly, the voter must be able to expend, that is, have for his own benefit, 40*s.* by the year.

It follows, therefore, that to vote in respect of an equity of redemption, first, *that* estate must be of the value of 40*s.* by the year, and secondly, the voter must have in respect thereof a present benefit or capacity of benefit of 40*s.* by the year.

If the land is mortgaged up to its full value, or to such an amount that the equity of redemption is not worth the purchase of 40*s.* a year, the first condition is not fulfilled. This was the case supposed by Lord Truro in *Copland* v. *Bartlett* (1), when he asked, "How was the right to vote formerly dealt with when the property in respect of which the vote was claimed was charged up to the full value? My impression is that the vote was never allowed." And the same opinion was expressed by Jervis, C.J., in *Beamish* v. *Stoke* (2), where he said: "The case does not find that that which the party has already paid towards the purchase-money is worth 40*s.* a year in perpetuity." And Maule, J., said: "Suppose a man agreed to stand in the claimant's shoes, would it be worth his while to give 40*s.* a year for his interest in the land?" This consideration was sufficient for the decision of those cases, which, though they raised and decided the question whether principal

(1) 6 C. B. 23. (2) 11 C. B. 37.

1871

ROLLESTON v. COPE.

could be deducted, did so upon statements of facts not shewing that the principal paid had created an interest worth 40*s.* a year beyond "reprises." In those cases, and with that striking and cardinal difference of facts from the present case, no doubt expressions were used by the judges indicating an opinion that the payments on account of the principal were to be considered as charges, which unquestionably they were in one sense, viz. that, until enough had been paid on account of principal to make the equity of redemption worth the purchase of a freehold of 40*s.* a year, there was nothing to satisfy the first condition in the statute. The concurrence of Williams, J., in *Robinson* v. *Dunkley* (1), is conclusive as to the true scope of these authorities.

In the present case, both conditions are fulfilled. The mortgage is for 300*l.* principal, to be repaid with interest in ten years by instalments of 3*l.* 9*s.* a month, making 41*l.* 8*s.* a year, or in all 414*l.*; so that the proportion of principal to interest is ascertained by the deed, and it is found as a fact. The property can, in fact, be redeemed for a present payment of 73*l.* 1*s.* The payments remaining to be made, if paid at the day, amount to 82*l.* 16*s.* The annual value above all charges except the mortgage is 31*l.* 4*s.*; so that the equity of redemption, if sold at the ridiculously low price of five years' purchase, would produce a sum sufficient to pay off the whole remaining charges, and leave a balance which, if invested in Consols, would produce more than 40*s.* a year. Why? For this simple reason: because the payments made by the mortgagor were not all "reprises," but, to the extent of the two-thirds or thereabouts paid (and found by the case to have been paid) on account of principal, they were investments, and permanently beneficial investments, by and for the mortgagor, as much as, or rather more than, if he had paid them into his banker's to be ready for the mortgagee when he chose to call for his money. Each of those payments, to the extent it represented, was a purchase for the mortgagor of so much of the mortgagee's interest in the land, and each of them added to the value of the mortgagor's estate, and now enures to his benefit. Each of them was, therefore, "expended" by and for him. Each would in a properly-kept account go to investment of capital, not mere outgoings. None of

(1) 15 C. B. (N.S.) 478; 33 L. J. (C.P.) 57.

them was a "reprise" in the proper sense of something taken back for the mere temporary use of the land.

As for the payments being pre-appointed to be made on certain days, this cannot alter their judicial character. The payment of the principal is invariably pre-appointed for some day. It is for the convenience of the parties, not to alter the relation between them, that several days are mentioned instead of one.

It follows, from what has been said, that the second condition of the statute of Hen. 6, as modified by the subsequent Acts giving the franchise to a mortgagor, is also complied with, because, deducting from 41*l.* 8*s.* the two-thirds which the case finds to be referable to principal, there remains 13*l.* 16*s.*, which deducted from 31*l.* 4*s.* leaves a clear substantial present annual value of 17*l.* 8*s.* In effect and substance, the claimant has a freehold worth at twenty years' purchase 630*l.*, less 73*l.* 1*s.* = 557*l.* 19*s.*; and, deducting out of the two years' payments that remain what can properly be called "reprises," he can "expend" 17*l.* 8*s.* by the year.

Thus, both upon the reason of the matter, and according to the distinct authority of Erle, C.J., and his companions, in *Robinson* v. *Dunkley* (1), the decision against the right to vote was wrong, and ought to be reversed.

MONTAGUE SMITH, J. I am of the same opinion: and, in consequence of the previous decisions in this court, I desire to add the reasons for my judgment.

The claimant (who is the appellant), being seised in fee of land and houses, mortgaged them by a deed dated the 12th of February, 1863, to the Leicester Building Society, to secure 300*l.* advanced by the society on three shares held by the claimant as a member of the society, to be repaid, with capitalized interest, in ten years, by monthly payments of 3*l.* 9*s.* The mortgage was in fee, subject to a proviso for redemption upon payment by the claimant during ten years of the subscriptions, redemption-moneys, and fines payable by him in respect of his three shares, according to the rules of the society and certain tables annexed to them; and the deed provided that, when the 300*l.* and all other payments should have

(1) 15 C. B. (N.S.) 478; 33 L. J. (C.P.) 57.

1871

ROLLESTON v. COPE.

been satisfied, the security should be in a certain prescribed manner discharged. A power was contained in the deed enabling the trustees, in case of default in the payment of the instalments, to take possession of the property, and sell the same to satisfy what might be due on the security.

The case finds that the claimant has always been in the actual possession of the property; that he has kept up the payment of all his instalments, having paid in all 350*l.*; and that he was entitled to redeem the property by a present payment of 73*l.* 1*s.* It is also found that the annual value of the property is 31*l.* 4*s.* The revising barrister further finds, which the mortgage-deed and rules enabled him to do, that the interest, which is not more than 7 per cent., is capitalized for the whole term, and added to the sum borrowed; and that, although no apportionment is made in form, yet if the monthly instalments, which amount to the annual payment of 41*l.* 8*s.*, were apportioned, two-thirds would be paid in discharge of principal, and one-third only in payment of interest.

It is obvious, from these findings, that in substance two-thirds of the annual payment of 41*l.* 8*s.*, viz. 27*l.* 12*s.*, goes in every year to reduce the principal, and so to increase the beneficial interest of the claimant in the estate, and one-third, viz. 13*l.* 16*s.* only, is attributable to interest; and that this latter sum, when deducted from 31*l.* 4*s.*, the annual value of the property, leaves 17*l.* 8*s.* as the clear beneficial annual value of the estate to the claimant.

The revising barrister held, in accordance with what he considered to be the effect of the decided cases, that the whole amount of the payments to the society was a charge upon the estate, and should be deducted from the annual value; and that, as this deduction would reduce such value below 40*s.*, the name of the claimant should be erased from the list of voters. But, on the other hand, he found, as the fact undoubtedly is, *that, if so much only of the annual payments as represented the interest on the loan ought to be deducted from the annual value, then the claimant had a freehold of the annual value of* 40*s.*; and, if this Court should hold that this was the proper deduction, he declared that the name of the claimant was to be restored to the list.

It appears to me that this last declaration of the revising barrister ought to prevail; for, on the above facts and findings, I come to

the conclusion that the claimant has a freehold of the value of more than 40*s.* by the year above all charges.

The question to be decided is, whether so much of the above annual payments as represents the repayment of the principal of the mortgage-debt is a charge within the meaning of the statute 8 Hen. 6, to be deducted from the annual value of the freehold.

The 8 Hen. 6, c. 7, requires the voter "*to have free land or tenement to the value of* 40*s. by the year above all charges*" (outre les reprises). The 6 Vict. c. 18, s. 74, after reciting 2 Wm. 4, c. 45, ss. 23 and 26, enacts that "no mortgagee of any lands, &c., shall have any vote for or by reason of any mortgage estate therein, unless he be in the actual possession or receipt of the rents and profits thereof; but that the *mortgagor in actual possession,* or in receipt of the rents and profits thereof, shall and may vote for the same, *notwithstanding such mortgage.*"

These are the statutes to be expounded. The statute 6 Vict. expressly enacts that a mortgagor in possession shall vote *notwithstanding the mortgage,* and, as a consequence, notwithstanding the mortgage-debt.

It has been settled, and, although at one time much questioned, it is not now disputed, that the interest on the mortgage-debt is a charge to be deducted from the annual value of the land. It was so decided by several election committees. And the Act of 28 Geo. 3, c. 36, s. 6, required a declaration from the voter that he had "an estate of the clear yearly value of 40*s.* over and above the *interest of any money secured by mortgage upon the said estate.*" This enactment, whilst it is a clear statutory declaration that the interest on a mortgage-debt is to be deducted from the annual value, amounts by necessary implication to an equally clear declaration that "the money secured by mortgage," that is, the principal, need not be deducted.

If the principal of the mortgage-debt were to be deducted in estimating the yearly value of the land, few mortgagors in the year when the principal fell due, or in any future year whilst it remained due, would be entitled to vote; for, the principal would in almost all cases exceed the yearly value of the estate. It is clear that this was not the intention of parliament; for, as I have

1871

ROLLESTON v. COPE.

already observed, it would be opposed to the express enactment of 6 Vict. c. 18, s. 74, that a mortgagor in possession may vote, notwithstanding the mortgage, which of course assumes the existence of the mortgage-debt.

Then, can it make a substantial difference that, instead of being payable in one sum, the principal money is to be paid by periodical instalments, biennial, annual, monthly, or otherwise? It is equally the principal money; and, so far from this distinction creating a difference adverse to the right to vote, it surely is in favour of the mortgagor that he is not liable to pay the whole principal at once.

If the question had been res integra, I confess I should have felt little hesitation in coming to a conclusion in favour of the claimant; but former decisions of this Court undoubtedly occasion some difficulty. In *Copland* v. *Bartlett* (1), there was a monthly payment of 15*s.*; but the case did not contain any finding to distinguish principal from interest, as the present case does; and the Court likened the whole payment to a payment of interest on a mortgage, and so gave judgment against the right to vote. The next case, *Lee* v. *Hutchinson* (2), is not an authority against the appellant. It decides no more than that the interest on the mortgage-money must be deducted from the annual value. The observations made by Jervis, C.J., and Maule, J., on the statute 28 Geo. 3, c. 36, are consistent with a decision in favour of the present claimant. In the case of *Beamish* v. *Stoke* (3), the mortgage-deed provided for a weekly contribution of 4*s.* 6*d.*, which, when paid, was appropriated by the secretary to three objects, viz. 1. to payment of interest; 2. the mortgagor's share of the incidental expenses of the society; and 3. the remainder to reduce the principal. The Court, although so much of the payment as was appropriated to interest did not reduce the value below 40*s.*, held that, inasmuch as the whole payment did so reduce it, the claimant was not entitled to vote. The judges there said, "that the case was governed by *Lee* v. *Hutchinson* (2), which only followed *Copland* v. *Bartlett*." (1) Now, certainly, in *Lee* v. *Hutchinson* (2)—in which the interest alone exceeded the annual value—the point assumed to have been decided by it did not arise. It may be

(1) 6 C. B. 18; 18 L. J. (C.P.) 50. (2) 8 C. B. 16; 20 L. J. (C.P.) 4.
(3) 11 C. B. 29; 21 L. J. (C.P.) 9.

observed also, that, in *Beamish* v. *Stoke* (1), the value of the equity of redemption was not found. In the course of the argument of that case, Jervis, C.J., said (2): "The case does not find that that which the party has already paid towards the purchase-money is worth 40*s.* a year in perpetuity." In the present case, facts are found from which it distinctly appears that what the claimant has so paid is worth much more than 40*s.* a year.

But, whatever may be the true effect of the cases on which I have now commented, I think that the later case of *Robinson* v. *Dunkley* (3) has shaken, and in my opinion overthrown, their authority, supposing they are to be construed as the respondent seeks to do. In *Robinson* v. *Dunkley* (3), the society had advanced to the claimant 73*l.*, and by his mortgage to the society he was to repay the advance by monthly sums amounting to 4*l.* a year. The deed did not apportion the payment between principal and interest. It appeared that the value of the land was only 3*l.* per annum, and that in the qualifying year the monthly sums were payable, so that, if the full amount of them was deducted from such value, a clear 40*s.* did not remain to the voter for that year; but, as it also appeared that 71*l.* of the principal had been paid off on the 31st of January, the Court held that the revising barrister was right in finding that the claimant had a freehold of the value of 40*s.* per annum, and in retaining his name on the list of voters, because, notwithstanding that the annual payment exceeded the annual value for that one year, the claimant had a clear beneficial interest in the land, beyond the incumbrance, of more than 40*s.* by the year.

It being plain that the monthly payments in the case of *Robinson* v. *Dunkley* (3) would, if wholly deducted, have reduced the value in the particular year below 40*s.*, it follows that, if the case of *Copland* v. *Bartlett* (4) was decided on the ground that the whole of these payments are to be deducted from the annual value, whatever may be the value of the equity of redemption, then the decision in the latter case is opposed to that ratio decidendi, and overrules it;

(1) 11 C. B. 29; 21 L. J. (C.P.) 9.
(2) 11 C. B. 37.
(3) 15 C. B. (N.S.) 478; 33 L. J. (C.P.) 57.
(4) 6 C. B. 18; 18 L. J. (C.P.) 50.

1871

ROLLESTON v. COPE.

and, if that was not the ratio decidendi in *Copland* v. *Bartlett* (1), then that case is not necessarily in opposition to the right of the claimant in the present appeal, where the revising barrister has found that, after deducting the charge for interest, there is an annual value accruing to the mortgagor of more than 40*s*.

I own that I can interpret *Robinson* v. *Dunkley* (2) in no other way than as a decision that so much of the monthly payments as represented a repayment of principal money did not form a charge on the annual value. It is true that in that case a large amount of the principal money had been paid off; but the largeness or smallness of the amount paid off cannot make an essential difference, so long as the whole mortgage-debt remaining due does not reduce the value of the equity of redemption below 40*s*. by the year.

Considering the question on principle, I confess I can see no distinction between a mortgagor who has to repay the mortgage-debt in a single sum and one who has to repay it by periodical payments, except one in favour of the latter. In substance, the latter would be, from the nature of things, in a sounder position; for, he would, on payment of each instalment, relieve his land of part of its burden, and increase the beneficial value of it, whilst the former was suffering the whole burden to remain upon it; and this anomaly would occur from a contrary view, viz. that a man who had borrowed 100*l*. on his land, payable by instalments, and had paid off 90*l*., would have no vote, whilst the man who borrowed 100*l*. payable in one sum, and who had paid off nothing, would be entitled to vote. But, in neither case, as it seems to me, can the principal debt be properly deemed a charge on the annual value. It is a charge on the corpus of the estate, and every payment of an instalment of it is so much added to the beneficial interest of the mortgagor.

If, indeed, the whole mortgage-debt is so large in proportion to the estate that it would cover the full value of it, or so nearly as not to leave a beneficial interest of the yearly value of 40*s*. to the mortgagor, then there would be an entire failure of such an interest in the freehold as would entitle the mortgagor to a vote.

(1) 6 C. B. 18; 18 L. J. (C.P.) 50.
(2) 15 C. B. (N.S.) 478; 33 L. J. (C.P.) 57.

1871

ROLLESTON v. COPE.

In the present case, the principal debt does not produce this consequence; and therefore, for the reasons above referred to, I think the decision of the revising barrister should be reversed.

BRETT, J. I entirely agree in the judgment pronounced by my Brother Willes, and I must confess I can see no answer to it. Any doubt which I may ever have entertained was whether the Court could come to that conclusion after the decisions in *Copland* v. *Bartlett* (1) and *Beamish* v. *Stoke* (2), and after the rights of so many persons had been dealt with in the courts of revision upon the faith of that interpretation of the law.

Decision reversed.

Attorney for appellant: *A. Tibbitts, for J. Harvey, Leicester.*

Attorney for respondent: *John Mortimer, for T. Spooner, Leicester.*

TAYLOR, APPELLANT; THE OVERSEERS OF THE PARISH OF ST. MARY ABBOTT, KENSINGTON, RESPONDENTS.

1870

Nov. 11.

Parliament—Borough Vote—Residence—Lodger—30 & 31 Vict. c. 102, s. 4, subs. 3.

A. being employed to attend upon a gentleman, lodgings were taken for him in the same house as the gentleman, in which he might and did usually sleep, but he was not bound by his agreement to do so. A. had also lodgings in the borough of C., where his wife and children resided, and in which he could sleep at any time, and did in fact sleep at least once a week:—

Held, that A. resided in the lodgings in the borough of C., within the meaning of 30 & 31 Vict. c. 102, s. 4, subs. 3, and was entitled to vote as a lodger for the borough of C.

APPEAL from the Revising Barrister for the borough of Chelsea.

Samuel Thomas Taylor duly claimed to have his name inserted on the register for the borough of Chelsea, in respect of the occupation of lodgings at 17, Edge Terrace, Kensington.

The claimant had taken the lodgings, and his wife and family had occupied them and resided in them during the twelve months immediately preceding the last day of July last past.

(1) 6 C. B. 18; 18 L. J. (C.P.) 50. (2) 11 C. B. 29; 21 L. J. (C.P.) 9.

1870

TAYLOR v. OVERSEERS OF ST. MARY ABBOTT.

Under the circumstances, and for the reasons hereinafter stated, the claimant had slept in the lodgings during the twelve months, in every week one night, and in some two nights, only.

During the twelve months the claimant had been employed as attendant upon a gentleman upon whom his relatives and friends deemed it necessary that some one should be in constant attendance in the daytime.

To enable the claimant to perform the duties required of him, the friends of the gentleman deemed it necessary and desirable that the claimant should lodge in the same house with the gentleman, and did in fact take two rooms as lodgings for the claimant in the same house, 22, Porteus Road, Maida Hill.

With the exception of the one or two nights in each week when the claimant slept at the lodgings in Edge Terrace he slept in the lodgings in Porteus Road, so provided for him by his employers; and upon the occasions when the claimant slept away from Porteus Road, he always mentioned the fact to the landlord of the house in Porteus Road before he left.

It was contended on behalf of the claimant that by such occupation of the lodgings in Edge Terrace, in respect of which he claimed, by his wife, and such residence therein by himself, he was duly qualified to have his name inserted on the register.

The revising barrister held that such residence was not sufficient to qualify him within the meaning of the 3rd subsection of the 4th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), and disallowed his claim.

The question for the Court was, whether or not the revising barrister rightly decided that the claimant was not entitled to have his name inserted in the register of voters for the borough of Chelsea.

Casswell, for the appellant. The appellant returned to the lodgings in Chelsea every week, and could have returned there any time he pleased, and his residence was therefore sufficient. In *Powell* v. *Guest* (1), Erle, C.J., says that an imprisonment for debt would not prevent the person imprisoned residing, within the meaning of the Registration Act, at a place to which he could at

(1) 18 C. B. (N.S.) 72; 34 L. J. (C.P.) 69.

any time return, by paying the debt. There does not appear to have been anything in the appellant's contract which obliged him to reside at all at Porteus Road, though he could do so if he pleased. In *Pryme's Case* (1), Mr. Pryme had only resided in the lodgings sixteen weeks in the year, and had a house elsewhere at which his family resided, and the vote was held good.

The respondents did not appear.

BOVILL, C.J. I am unable to distinguish the present case from that of a man who has two houses, and lives at each when he pleases: in such a case he would reside at both houses within the meaning of the Act. Otherwise, a person who lived in the suburbs of London, but had a bedroom at his place of business in London where he occasionally slept, would by such occasional sleeping cease to reside at his house. In the present case the claimant's wife and family always resided at the lodgings in Edge Terrace, and he himself could sleep there when he liked; he had not bound himself to sleep elsewhere. The lodgings which were taken for him at Porteus Road were taken for his convenience, and not with the intention of obliging him to sleep there. I think, therefore, the decision of the revising barrister should be reversed.

WILLES, J. I am of the same opinion. It appears to me that the lodgings in the same house with the gentleman under the care of the claimant were provided, not that the claimant might be compelled to sleep there, but that if he thought proper, from stress of weather or any other cause, he might do so. Unless he had thought proper he might never have slept there. A man does not cease to reside with his family by having a bedroom at his place of business, which he occasionally uses.

KEATING, J. I am of the same opinion. I think the claimant had resided and continued to reside at Edge Terrace. He had power to return to his lodgings there when he pleased, and he had no other residence, properly so called. I am clear that a residence, where his wife and family resided, and to which he could return

(1) Wolf. & Dew. 51.

1870

TAYLOR v. OVERSEERS OF ST. MARY ABBOTT.

at any time, and to which he did in fact return from time to time, is sufficient for the purpose of conferring the franchise.

BRETT, J., concurred.

Decision reversed.

Attorneys for appellant: *Shepheard & Son.*

Nov. 11.

BOND, APPELLANT; THE OVERSEERS OF THE PARISH OF ST. GEORGE, HANOVER SQUARE, RESPONDENTS.

Parliament—Borough Vote—Residence—Lodger—30 & 31 *Vict. c.* 102, *s.* 4, *subs.* 3.

9 C.P.D. 274. 5 C.P.D. 614

A. occupied lodgings in a borough in London, separately and as sole tenant, for the requisite twelve months. He had also a house in the county of D., where he kept an establishment of servants all the year round. When in London, he resided at the lodgings, and had done so at intervals for two months out of the twelve:—

Held, a sufficient residence within the meaning of 30 & 31 Vict. c. 102, s. 4, subs. 3, to entitle A. to vote as lodger for the borough.

APPEAL from the Revising Barrister for the city of Westminster.

Thomas Bond claimed to have his name inserted on the register as a voter for the city of Westminster in respect of the occupation of lodgings in the parish of St. George, Hanover Square.

Bond had duly and bonâ fide occupied, during the twelve months required by the Act, the lodgings mentioned in his notice of claim; that is to say, from a date prior to the last day of July, in the year 1869, he had been and still was a yearly tenant of the lodgings; and such tenancy could only be terminated by a six months notice; during the twelve months preceding the last day of July last past, he had been the sole tenant of the lodgings, and had occupied them separately.

Prior to and during the period of his occupation of the lodgings, he had occupied a house at Tyneham, near Wareham, in the county of Dorset, and there kept an establishment of servants all the year round, and there he resided during such portions of the year as he was not in London.

When in London, he resided in the lodgings, and during the

twelve months immediately preceding the last day of July last past, he had resided in his lodgings during the following periods:—

In the year 1869: from the 24th till the 28th of September; from the 10th till the 15th of November. In the year 1870: from the 23rd of April till the 21st of May; from the 26th till the 31st of May; from the 9th till the 23rd of June; from the 27th of June till the 4th of July.

It was contended on behalf of Bond, that such occupation of and residence in the lodgings, in respect of which he claimed, were sufficient to qualify him to have his name inserted on the register.

The revising barrister held that such residence was not sufficient, and that Bond had not resided in the lodgings for the period and in the manner enacted by s. 4, subs. 3 of the Representation of the People Act, 1867, and disallowed his claim.

The question for the Court was, whether or not the revising barrister rightly decided that Bond was not entitled to have his name inserted in the register of voters.

Shield, for the appellant. This case is similar to *Taylor* v. *St. Mary Abbott*. (1) Residence was required by the Reform Act (2 Wm. 4, c. 45), s. 29, for the 10*l*. franchise in boroughs as much as it is now for lodgers, and all the decisions on that section are applicable to the present case, and they all shew that there need not be a continuous residence if there is no interruption of the right to reside.

[WILLES, J. In the *Northallerton Case* (2), I held that a farmer resided at a house for which he paid the rates and taxes, and of which he was the sole occupier, though he only slept there occasionally.

KEATING, J. The case of *Whithorn* v. *Thomas* (3), shews that the mere fact of a person having an establishment in one place, does not prevent his residing also in another. The residence there was held insufficient because it was not bonâ fide.]

The cases referred to in *Taylor* v. *St. Mary Abbott* (1), are to the same effect.

The respondents did not appear.

(1) Ante, p. 309.

(2) O'Mall. & Hard. at p. 170.

(3) 7 M. & G. 1.

1870

BOND v. OVERSEERS OF ST. GEORGE, HANOVER SQUARE.

BOVILL, C.J. In this case the claimant occupied his rooms as a lodger separately and as yearly and sole tenant for the requisite time, and the only question is, whether he resided in them as required by 30 & 31 Vict. c. 102, s. 4, subs. 3. It is true that he had no wife and family or servants residing in the rooms in his absence, but still he was sole tenant of them, with a power to go there when he pleased, which he exercised from time to time. It is clear that no one else resided, or had a right to reside, in the rooms, and it is certainly not necessary that there should be an uninterrupted abiding in a place to constitute a residence, otherwise no one who had a country house could be held to reside in London; and, in truth, very few persons of large property live always in the same house. If we did not hold the residence in this case sufficient we should have to hold that there must be an uninterrupted abiding in a place to constitute residence. I think, therefore, the decision of the revising barrister must be reversed.

WILLES, J. I think the decision of the revising barrister in this case was in effect that a man cannot have two residences, and that cannot be sustained.

KEATING, J., concurred.

14 Q.B. 478
5 C.P.D. 64

BRETT, J. It is found, as a fact in the case, that the claimant occupied his lodgings separately and as sole tenant, and the only question is, whether there was a sufficient residence in them. The Court, therefore, have to decide what is sufficient to constitute residence. Now, in *Powell* v. *Guest* (1) Erle, C.J., said that he fully adopted the statement in Elliot on Registration, 2nd ed. p. 204, that, "in order to constitute residence, a party must possess at least a sleeping apartment, but that an uninterrupted abiding at such dwelling is not requisite, and that absence, no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence." Here the claimant being a yearly tenant of rooms which he occupied separately could certainly return to them when he liked, and had clearly the intention of

(1) 18 C. B. (N.S.) 72, 80; 34 L. J. (C.P.) 69, 70.

10 Jur. N.S. 1238

returning from time to time, and therefore the case comes within the proposition of Mr. Elliot; and as that has, I believe, been always acted upon in revising barristers' courts, and must have been known to parliament when this Act was passed, I think it must be taken that the Act intended such residence to be sufficient.

Decision reversed.

Attorneys for appellant: *Rogerson & Ford.*

CROSS, APPELLANT; ALSOP, RESPONDENT.

Nov. 18.

Parliament—Borough Vote—Part of a House—Separate Rating under 30 & 31 *Vict. c.* 102, *s.* 61 — *Construction of s.* 19 *of the Poor-rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41).

To entitle the occupier of part of a house to the franchise, under ss. 3, 61, of 30 & 31 Vict. c. 102, he must, notwithstanding the proviso in s. 19 of 32 & 33 Vict. c. 41, be separately rated to the relief of the poor, unless the case is brought within s. 3 or s. 4 of the last-mentioned Act.

S. 19 of 32 & 33 Vict. c. 41 enacts that "the overseers, in making out the poor-rate, shall in every case, whether the rate is collected from the owner or occupier or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid," and provides that "any occupier whose name has been omitted shall, notwithstanding such omission and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted":—

Held, that this section applies only where there has been an agreement in writing under s. 3, between the overseers and the owner of the premises, to receive the rates from him, or where there has been an order by the vestry for rating the owner instead of the occupiers, under s. 4.

APPEAL from the Revising Barrister for the city of London.

The respondent objected to the name of the appellant being retained on the list of persons entitled to vote in respect of their occupation of dwelling-houses.

1. The appellant was on the last day of July, 1870, and had during the whole of the preceding twelve calendar months been, an inhabitant occupier, as sole tenant, of two rooms on the second floor in a house No. 6, Great Montague Court, in the parish of

1870

CROSS v. ALSOP.

St. Botolph-without-Aldersgate, as his dwelling. This house is one of which there are many in the city of London formerly used as the dwelling-house of one family, but now wholly let out in separate portions to persons who occupy the same as their respective dwellings, or for trade or business offices. Such rooms occupied by the appellant, being part of a house, were not so structurally severed from the rest of the building as to constitute of themselves a house, according to the legal definition of a dwelling-house, as laid down in *Cook* v. *Humber* (1) with reference to the Reform Act (2 Wm. 4, c. 45). The part of the house occupied by the appellant was let to him as tenant from week to week, at a weekly rent of 4*s.* 6*d.*, under an agreement that the owner, who was his landlord, should thereout pay all the rates on behalf of the appellant in respect of the premises occupied by him, the rent being higher than it would have been if the appellant were personally to pay the rates to the collector.

2. The rooms were let to the appellant unfurnished, and no attendance was provided by the landlord; neither was any control reserved to, or in fact exercised by, the landlord over the same. The appellant alone, and to the exclusion of the landlord, had the keys of the doors of his rooms. He also had a key to the door of the house opening on to the street, and enjoyed under his demise all such easements and rights of way as gave him an independent occupation of the part of the house so demised to him as aforesaid. The landlord retained no part of the house in his occupation; and the two tenants occupying the remaining parts of the house occupied their several parts in like manner as the appellant.

3. At the time of the passing of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), there were no special enactments as to rating in force in the parish.

4. The overseers had agreed with the owner to collect the rates of him, and had in making out the poor-rate entered in the occupiers' column of the rate-book the name of the appellant and the other two tenants against the number of the said house; and, in the appropriate columns, in line with the said names, the name of the owner, the rental, the rateable value (14*l.*) of the whole house and rate in the pound alone appeared.

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

1870

CROSS v. ALSOP.

5. No separate sum as rating or assessment in respect of the part of the house so occupied by the appellant was carried out opposite to the name of the appellant, or in respect of the parts respectively occupied by the other tenants.

6. Both the rates and the rent had been duly paid, and all other requisites not herein specifically mentioned, to entitle the appellant to be retained on the list of voters as an inhabitant householder, were duly proved.

7. It was contended by the objector that the appellant's name should be struck off the list, on the grounds: 1. That the tenement occupied by the appellant was not a part of a house occupied as a separate dwelling and separately rated to the relief of the poor, within the meaning of the Representation of the People Act, 1867, by reason of its not being structurally severed from the rest of the house, and not being in fact separately rated: 2. That such tenement was not a rateable hereditament within the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41): 3. That it had been decided by the Court of Common Pleas, in *Hains* v. *Cuthbertson* (1), that such an occupier as the appellant was entitled to be registered as a lodger within the meaning of the Representation of the People Act, 1867, and therefore could not be entitled to be registered as an occupier.

8. For the appellant it was argued that, previous to *Cook* v. *Humber* (2), in construing the Act of 2 Wm. 4, c. 45, this Court had repeatedly decided that a person occupying separately, in the manner this appellant occupied, part of a house, was entitled to be placed on the register; that the case of *Cook* v. *Humber* (2) had only decided that the true test whether a part of a house was a "house" within the meaning of the last-mentioned Act, was not the manner of its occupation, but that the part should be structurally severed from the rest; that the Representation of the People Act, 1867, which was passed after the decision of *Cook* v. *Humber* (2), had made separate occupation, not structural severance, the test, when accompanied by separate rating, as to whether part of a house used as a dwelling conferred the franchise or not; that here the appellant occupied part of a house as a separate dwelling

(1) Law Rep. 4 C. P. 528, n.
(2) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

1870

CROSS v. ALSOP.

within the meaning of the last-mentioned Act; that structural severance was not, but that such separate occupation as that of the appellant was, the test of the rateability of an occupier of part of a house; that the appellant was legally rateable as an occupier in respect of the tenement he occupied, and that therefore it was a rateable hereditament within the meaning of the Poor Rate Assessment and Collection Act, 1869; that he was rateable only for what he did occupy, and therefore was not rateable either solely or jointly in respect of the whole house, but, by virtue of the last-mentioned Act, he must be deemed to be duly, that is, separately, rated for the tenement he occupied, and was entitled to every qualification and franchise depending upon such rating; and that the decision of this Court in *Hains* v. *Cuthbertson* (1) was given after hearing the cross-appeal in *Cuthbertson* v. *Hains* (2), where the facts were insufficiently stated.

9. The revising barrister held that, though in his judgment the appellant occupied part of a house as a separate dwelling within the meaning of the words of the 61st section of the Representation of the People Act, 1867, and was legally separately rateable for that part, and, so far as regarded his right to the franchise, the Poor Rate Assessment and Collection Act, 1869, saved the same, either notwithstanding or in consequence of the overseers having so inserted his name in the rate-book as aforesaid, or notwithstanding they had omitted to rate him separately for the tenement he occupied; yet, being of opinion that the Court of Common Pleas had in *Hains* v. *Cuthbertson* (1) decided that the status of such a tenant as the appellant was that of a lodger, not of an occupier, within the meaning of the Representation of the People Act, 1867, he must allow the objection; and he accordingly struck the appellant's name off the list.

10. He also struck off the names of two hundred and seventy other persons who had been objected to on the same grounds, and whose appeals were consolidated with the principal case.

Sir G. Honyman, Q.C. (*F. M. White* with him), for the appellant. The revising barrister has found that the appellant occupied a "separate dwelling" within s. 61 of the Representation of the

(1) Law Rep. 4 C. P. 528, n. (2) Law Rep. 4 C. P. 525.

People Act, 1867 (1), and was separately rateable in respect of such occupation, and that, though not actually rated separately, his right to the franchise was saved by the provisions of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41).

[BOVILL, C.J. He decided, upon the supposed authority of *Hains* v. *Cuthbertson* (2), that the status of the appellant was that of a "lodger." We, however, did not in that case hold the appellant to be a lodger: the decision turned upon the question of rating only. The case, indeed, assumed the appellant to be a lodger: but I for one would not have held him to be so.]

Then as to rating. The occupiers of these rooms would have been separately rateable under the statute of Elizabeth, but for the exception as to a "dwelling-house or tenement wholly let out in apartments or lodgings not separately rated," in s. 7 of the Representation of the People Act, 1867, and the construction put upon that section by the majority of the Court in *Stamper* v. *Sunderland* (3), where Bovill, C.J., says: "As each tenant of a room here has the sole and exclusive occupation and control over it, although he has the use of the other parts of the house in common with the other tenants, he must, I think, be considered as the occupier of a separate tenement for rating purposes. Indeed, unless this be so, there would be no person who could be properly described as the occupier. I think, therefore, that, under the statute of Elizabeth, and but for the exception in the 7th section of the Act of last session (4), these separate occupiers of rooms would be liable to be separately rated to the relief of the poor." Under s. 30 of the Reform Act, 2 Wm. 4, c. 45, the appellant might have claimed to be rated; and, having done so, upon

(1) The decision turning upon the question of separate rating only, the arguments upon the other point are omitted. For the appellant, reliance was placed upon ss. 3 and 61 of the Representation of the People Act, 1867; and the cases of *Cook* v. *Humber* (11 C. B. (N.S.), 33; 31 L. J. (C.P.) 73), and *Barnes* v. *Peters* (Law Rep. 4 C. P. 539), were referred to. For the respondent, *Giffard, Q.C.*, referred, for the definition of a householder, as distinguished from a lodger, to the resolution of the committee in *The Cirencester Case* (2 Fraser, 445, at pp. 449, 450), and to the cases of *The Warden of the Fleet*, *Rex* v. *Eyles* (Cald. 407), *Rex* v. *Mayor of Eye* (9 Ad. & E. 677), and *Henrette* v. *Booth* (15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61).

(2) Law Rep. 4 C. P. 528, n.

(3) Law Rep. 3 C. P. 388, 395.

(4) 30 & 31 Vict. c. 102.

1870

CROSS v. ALSOP.

paying or tendering the amount of the rate, he would be "deemed to have been rated to the relief of the poor in respect of such premises."

[BRETT, J. That section only applied to persons who occupied in such a way as to make them rateable.

KEATING, J. Could the appellant, under s. 30 of the Reform Act, have claimed to be rated, unless his tenement was such as to bring him within s. 27 ?]

Probably not. The provision in s. 30 of the Reform Act is incorporated with s. 61 of the Representation of the People Act, 1867. Although the owner was liable to be rated under s. 30, the occupier might claim to be rated, and that was to be deemed equivalent to actual rating, for the purpose of the parliamentary franchise. Under several local Acts, as well as under the Small Tenements Act (13 & 14 Vict. c. 99), the owner was to be rated "instead of" the occupier. This provision was therefore introduced in order to prevent the tenant or occupier from being deprived of the franchise, notwithstanding he could not be rated. Under 32 & 33 Vict. c. 41, the occupier need not claim to be rated: s. 7 enacts that "every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, shall be deemed a payment of the full rate by the occupier, for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor-rate." Prior to the passing of 32 & 33 Vict. c. 41, the occupier was to be deemed to have been rated, provided he claimed. Now, he is put in the same position, though he has made no claim to be rated. The 19th section of that Act enacts that "the overseers, in making out the poor-rate, shall in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid: Provided that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same

manner as if his name had not been so omitted." The effect of that proviso, coupled with s. 30 of the Reform Act, is, that the appellant is to be deemed to have been duly rated.

[BOVILL, C.J. The statement in par. 4 of the case is consistent with there having been an unauthorized rating altogether. It does not appear that there was any agreement in writing between the overseers and the owner of the premises, so as to bring the case within s. 3, or any order of the vestry for rating the owner instead of the occupiers, so as to bring it within s. 4. Under these circumstances, it would seem that neither s. 7 nor s. 19 can have any application.

WILLES, J. I should assume that there was a rating of the three occupiers jointly for the whole rateable value. It would be more satisfactory to see the rate-book.

[The rate-book was produced, and it was found that the three occupiers were rated *jointly* for the full rateable value of the house, 14*l.*, the owner not being rated at all.]

H. S. Giffard, Q.C. (*Beasley* with him), for the respondent. The Representation of the People Act, 1867, in s. 61 requires that the occupier of part of a dwelling-house, to entitle him to the franchise, shall be separately rated in respect thereof to the relief of the poor. That requirement has not been complied with here; and the appellant did not claim to be rated. No aid can be derived from s. 19 of 32 & 33 Vict. c. 41, because there was no agreement in writing between the overseers and the owner of the premises that the rate should be received from him under s. 3, nor any order of the vestry that the owner should be rated instead of the occupiers, in conformity with s. 4.

BOVILL, C.J. The misfortune in this case is that the overseers of the parish have not thought fit to pursue the provisions of the Poor Rate Assessment and Collection Act, 1869; or perhaps I should say it is to be regretted that the parties have not brought themselves within the provisions of that Act. The 3rd section of the Act authorizes the owners to enter into an agreement in writing with the overseers to become liable to them for the poor-rates assessed in respect of the hereditaments; and certain advantages are to accrue to the owner from such arrangement,—the overseers

1870

CROSS v. ALSOP.

may allow the owner a commission on the amount of the rate. The 4th section enables the vestry to order that the owners of all rateable hereditaments to which s. 3 of the Act extends be rated instead of the occupiers. Now, here there was no agreement entered into within the meaning of s. 3, but simply an agreement by the overseers with the owner to collect the rates of him. The statement in the case is not very clear, but it does not amount to a statement of an agreement in writing within s. 3. Neither was there any order of the vestry under s. 4. The greater part of the subsequent sections of the Act of 1869 are based upon the notion that the provisions of either s. 3 or s. 4 will be carried out. The earlier part of s. 19 expressly refers to agreements made with the overseers under s. 3 making the owner liable to the payment of the rate instead of the occupier, and therefore that part of the section has no application to this case: and, with respect to the proviso at the end of that section, that "any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted," is applicable only where the name of the occupier has been omitted from the rate; which is not the present case, for here the names of the several occupiers are inserted in the rate. The effect is that the Poor Rate Assessment Act, 1869, has no application to this case, and the appellant is thrown back to the Act of 1867, the 61st section of which requires that the part of the house which is to confer the franchise under s. 3 be separately rated to the relief of the poor. As to this the statement in the case is that the names of the occupiers of the several rooms in the house are inserted in the rate jointly, and the whole are rated at a joint sum of 14*l.*; and that statement is confirmed by the rate-book which was produced before us. The conclusion at which I arrive therefore is that there was a joint rating of all the occupiers, and not a separate rating as required by the Act of 1867. I think the appeal must be dismissed upon that ground, and consequently it is unnecessary to go into the other question, which arises in other cases now under consideration. (1)

(1) *Thompson* v. *Ward* and *Ellis* v. *Burch*, post, p. 327.

1870

CROSS v. ALSOP.

WILLES, J. I also think that the appeal should be dismissed, and the decision of the revising barrister affirmed, though not upon the ground on which he rested it. He appears to have acted upon an erroneous impression conveyed by the report of *Hains* v. *Cuthbertson*. (1) Assuming that the appellant, if properly rated, would have been entitled to the franchise, it is clear that he had not been rated so as to satisfy the requirements of the statutes. The Representation of the People Act, 1867 (30 & 31 Vict. c. 102), considerably enlarged the franchise; and, in dealing with those who are to acquire a right to vote in respect of the occupation of "part of a house," s. 61 provides that "dwelling-house shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." It is necessary, therefore, in order to the acquisition of the franchise under that section, that there should be a "separate rating" of the occupier. Here, there was no separate rating of the appellant. The mode in which the premises were rated appears to be correctly described by the revising barrister in the statement of the case. It is a rating of the appellant and the two other occupants as a joint rating, and not a separate rating of each. If it had been intended as a rating of the owner, the owners' column would have been filled up, and not left as it was, in blank. Therefore the persons who were primâ facie liable were rated, and jointly rated for the whole house, and not each separately rated so as to satisfy the requirements of s. 61. Nothing therefore can be plainer than that the appellant has no right to the franchise, unless his case is helped by the Poor Rate Assessment and Collection Act, 1869. It is said that s. 19 of that Act does help the appellant. Upon first reading that section, it is not surprising that that conclusion should be come to; but, upon examining it carefully, it will be found to be a mere mode of giving effect to some earlier provisions which do not apply here. [The learned judge read the section.] Reading the proviso at the end of the section by itself, it would seem that no rating at all is necessary. But it is obvious that that is not so; for, had that been intended, the legislature would not have enacted that the occupier should not be prejudiced by such omission, but that he should have the franchise, whether he was rated or not. This, however, would have

(1) Law Rep. 4 C. P. 528, n.

1870

CROSS v. ALSOP.

been quite contrary to the principle of the Representation of the People Act, 1867. Reading back, you find that s. 19 enacts that the overseers, in making out the poor-rate, shall, in every case, whether the rate is collected from the owner or occupier, or whether the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid. Therefore, it is quite clear that the legislature did not intend to do away with the condition of rating altogether; but only that, where the overseers were required to put him on the rate for conformity, so to speak, the omission to put the occupier's name in the rate-book should not defeat his qualification or franchise. Now, what are the cases mentioned in s. 19 in which the overseers are to enter the occupier's name in the rate? They are to do so "in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier." As regards the case where the rate is collected from the occupier, that has been disposed of; for, to say that in every case the omission to rate the occupier would not affect the right to the franchise, would be contrary to the meaning of the Act. Then, turn to the case where the rate is collected from the owner; that must be, as pointed out in s. 3, where there is an agreement in writing between the owner and the overseers, and for a term. They are, in consideration of a commission, to agree to receive the rates from the owner. There was no such agreement in the present case. Then we come to s. 4, under which the vestry are impowered to rate the owner instead of the occupier; and that gives the second branch of the alternative in s. 19, where the owner is liable to the payment of the rate instead of the occupier: and here no such order has been made by the vestry as is contemplated in that section. It is quite obvious to my mind that the case is not within the proviso in s. 19, which is only a machinery to prevent the occupier from being damaged by the omission of his name from the rate-book, where the rate is collected from the owner under an agreement entered into under s. 3, or where there has been an order of the vestry under s. 4. I would further observe, on s. 7, that I am not satisfied that the statute

10 Q.B. 427

1870

CROSS v. ALSOP.

intended to deal with the cases of persons who occupy only parts of a house. As to these, I am not satisfied that the Act of 1867 is not still in full force. I will not, however, enlarge upon that; for, I desire to guard myself from being bound by any expression of opinion upon this occasion. The expression in the case, "the overseers had agreed with the owner to collect the rates of him," seems to shew that the revising barrister came to the conclusion that any loose agreement to receive the rates from the owner, not binding upon either of them, would be sufficient to bring the case within the proviso in s. 19. I cannot, however, conceive that the legislature intended any such shuffling enactment to be expressed by that section; and, for the reasons I have given, and because the appellant was not properly rated, I am of opinion that the appeal cannot be sustained.

KEATING, J. I also am of opinion that the decision should be affirmed, though on a different ground from that relied on by the revising barrister. The ground upon which I rest my opinion is, that the appellant was not separately rated, but was rated jointly with others. At first sight, it seems to be a strong thing to disfranchise a man because, though he has been made liable to the payment of the rate of a house of 14*l.* annual value, he has not been made liable to the payment of a rate of much smaller amount. The simple answer to that, however, is, that the legislature has so willed it: and I see good reason for it. The legislature in ss. 3 and 61 of the Representation of the People Act, 1867, had attached great importance to separate occupation of dwelling-houses, and as one test made separate rating absolutely essential. It is not our province to find reasons why the legislature should have so enacted. Suffice it that they have distinctly declared that, in order to obtain the franchise, where value is no part of the qualification, the party must be separately rated to the relief of the poor. According to the statement of this case, the appellant was not so separately rated, but was rated for the whole house jointly with others. That does not satisfy the words of this enactment. Sir George Honyman did not take issue on that; but he sought assistance from s. 19 of the Act of 1869. At first sight, that section did appear to me to assist his argument; but, upon further

1870

CROSS v. ALSOP.

consideration, I think otherwise. I agree with my Lord and my Brother Willes that s. 19 of 32 & 33 Vict. c. 41 is confined to cases where there has been an agreement in writing between the overseers and the owner to receive the rates from him, under s. 3, or where the owner alone has been rated pursuant to an order of the vestry, under s. 4; neither of which circumstances occurs here. It follows, therefore, that s. 19 does not help the appellant's case. He has not been separately rated, and therefore has not acquired the franchise.

BRETT, J. This case is not within s. 3 of the 32 & 33 Vict. c. 41, because there has been no such agreement between the overseers and the owner as is contemplated by that section; and it is not within s. 4, because the owner was not rated. It follows that it is not within s. 19. The first part of that section must be read, "although the rate is collected from the owner," which must apply to s. 3, "or the owner is liable to the payment of the rate instead of the occupier," which refers to s. 4, the overseers shall "enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid;" and the proviso points to the omission of the overseers to do what ought to have been done under ss. 3 and 4. Consequently, no part of s. 19 has any application to this case. The case of the appellant therefore fails, because he has not brought himself within s. 19 of 32 & 33 Vict. c. 41, nor has he satisfied the terms of s. 61 of 30 & 31 Vict. c. 102, because he was not separately rated. I agree with the rest of the Court that the decision of the revising barrister,—which was, contrary to his own opinion,—must be affirmed.

Decision affirmed. (1)

Attorneys for appellant: *Travers, Smith, & De Gex.*
Attorney for respondent: *T. Tayloe.*

(1) See the judgment of Bovill, C.J., in *Thompson* v. *Ward*, post, at pp. 366 and 364.

THOMPSON, APPELLANT; WARD, RESPONDENT.
ELLIS, APPELLANT; BURCH, RESPONDENT.

1871
April 24.

Parliament—Borough Vote—"Part of a House"—Structural Severance—Reform Act (2 *Wm.* 4, *c.* 45, *s.* 27)—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 61—"*Dwelling-house.*"

A. claimed to be registered for a borough in respect of "a house." He occupied as tenant at 4*l.* 10*s.* per annum *one room* in a house, which consisted of nine rooms, and was originally built for one family, though now let out in six several tenements. The passage and staircase, and the conveniences, consisting of a privy and ashpit, were common to all the tenants. There was an outer or street-door to the passage, which was never closed, and was without lock or bolt. Each tenant had the exclusive occupation of his room or rooms. The owner did not reside upon the premises:—

Held, by Bovill, C.J., and Keating, J., that the room so occupied by the claimant constituted a "dwelling-house" within ss. 3 and 61 of the Representation of the People Act, 1867.

Held, by Willes and Brett, JJ., that it did not.

B. claimed to be registered for a borough in respect of "a house." He occupied as tenant at 6*l.* 10*s.* per annum *two rooms* on two different floors in a house, which consisted of seven rooms, whereof the remaining five were occupied by another tenant. The passage and staircase were common to both tenants. The house had a front door to the street, which was generally kept open by day, and shut by one or other of the tenants at night, and was fastened by an ordinary latch and bolt. Neither tenant had any right to exclude the other from the use of the front door. The owner did not reside upon the premises:—

Held, by Bovill, C.J., and Keating, J., that such occupation of the two rooms by B. was the occupation of a "dwelling house" within ss. 3 and 61 of the Representation of the People Act, 1867.

Held, by Willes and Brett, JJ., that it was not.

Cook v. Humber (11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73), commented upon.

THOMPSON *v.* WARD.

APPEAL from the Revising Barrister for the city of Durham.

George Herbert appeared in the list of claimants published by the overseers of the township of Elvet in respect of the occupation of a house.

1. The claimant had for above a year prior and up to the 31st of July last occupied as a tenant at the rent of 4*l.* 10*s.* per annum one room in a house situate at Chapel Passage, Old Elvet, in the township of Elvet, in Durham.

2. The house consists of nine rooms, and is let out in six several

1871

THOMPSON v. WARD.

ELLIS v. BURCH.

tenements. Of these, three tenants occupy two rooms each, and each of the other tenants occupies one room.

3. The house was originally built for one family. The passage, staircase, and conveniences (consisting of a privy and ash-pit), which latter are situate in a yard opposite the passage, are common to all the tenants. Each of the tenants has a separate coal-house in the yard. There is an outer or street door to the passage, which is never closed, and without lock or bolt available, although it retains two staples through which a bolt formerly was and still might be shot.

4. Each tenant has the exclusive use and occupation of his or her respective room or rooms, for which they respectively pay the following rents,—W. Peacock, two rooms, 5*l.* 10*s.* a year; Mrs. Elliott, two rooms, 5*l.* a year; W. Robson, two rooms, 5*l.* a year; G. Herbert (the claimant), one room, 4*l.* 10*s.* a year; T. Smith, one room, 4*l.* 10*s.* a year; and Mrs. Bowly, one room, 4*l.* a year.

5. The owner does not reside on the premises. The name of the claimant appears as separately rated in the occupiers' column of the rate-book, on all rates made between the 31st of July, 1869, and 31st of July, 1870; but the landlord, whose name appears in the owners' column of the rate-book, has paid all the rates.

6. The claim was objected to on the ground that the claimant was not an occupier of a dwelling-house within the meaning of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), and was consequently not entitled to be registered as an elector.

7. On the other hand, it was contended that the premises occupied by the claimant constituted, under the interpretation clause (s. 61) of the Representation of the People Act, 1867, a dwelling-house; and that, by the operation of 32 & 33 Vict. c. 41, ss. 7 and 19, the payment of the rates by the owner should be deemed a payment by the occupier for the purpose of any qualification or franchise, which, as regards rating, depends on the payment of the poor-rate; and that the claimant was therefore qualified as an elector.

8. The revising barrister was of opinion that the premises occupied by the claimant were not a dwelling-house within the meaning of the Representation of the People Act, 1867, and disallowed the claim.

If the Court should be of opinion that the premises occupied by the claimant were a dwelling-house within the meaning of that Act, his name and the names of 112 other persons whose claims depended and were decided upon the same points of law, were to be inserted in the list.

Littler (*Manisty, Q.C.*, with him), for the appellant, contended that the room occupied by the claimant was a "part of a house occupied by him as a separate dwelling" within the meaning of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), ss. 3 and 61. He referred to *Lee* v. *Gansel* (1); *Reg.* v. *Mayor of Eye* (2); *Downing* v. *Luckett* (3); *Cook* v. *Humber* (4); *Wilson* v. *Roberts* (5); *Henrette* v. *Booth* (6); *Barnes* v. *Peters* (7), and the judgment of Willes, J., in *Brewer* v. *M'Gowan* (8).

Sir John Karslake, Q.C. (*Pinder* with him), for the respondent, contended that, regard being had to the cases decided upon the Reform Act, 2 Wm. 4, c. 45, s. 27, and to the language of the Act of 1867, the premises occupied by the claimant did not constitute a dwelling-house within the meaning of ss. 3 and 61, in which the legislature was conferring a new franchise. He referred to *Lee* v. *Gansel* (1), *Cook* v. *Humber* (4), *Henrette* v. *Booth* (6), and the cases referred to in Rogers on Elections, ed. 1827, p. 73.

Littler, in reply.

Cur. adv. vult.

ELLIS *v.* BURCH.

Appeal from the Revising Barrister for the city of Exeter.

The respondent objected to the name of the appellant being retained upon the list of persons entitled to vote in the election of members for the city in respect of his occupation of a dwelling-house.

1. The appellant was on the 31st of July, 1870, and had been during the whole of the preceding twelve calendar months, the occupier of two rooms in a seven-roomed house in Prospect Place,

(1) Cowp. 1.
(2) 9 Ad. & E. 670.
(3) 5 C. B. 40; 17 L. J. (C. P.) 31.
(4) 11 C. B. (N.S.) 33; 31 L. J. (C. P.) 73.
(5) 11 C. B. (N.S.) 50.
(6) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.
(7) Law Rep. 4 C. P. 539.
(8) Law Rep. 5 C. P. at p. 244.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

of which a Miss Avery was the owner. He occupied these rooms as tenant to Miss Avery at an annual rent of 6*l.* 10*s.*, and the rooms were separately rated, and he was separately rated in respect of them to all rates which had been made for the relief of the poor during the aforesaid twelve months, and by his agreement with Miss Avery such rates were to be paid by her, and had been duly paid accordingly. All other rates and assessed taxes requisite to be paid in respect of the premises occupied by the appellant were duly paid. The rest of the house, viz. five rooms, was occupied by one Chambers, also as tenant to Miss Avery, at an annual rent of 9*l.* 11*s.* 9*d.*, she paying all rates and taxes; and he was separately rated, and the part of the house so occupied by him was separately rated to the relief of the poor. Miss Avery did not reside on the premises.

2. The house had a front door, which was generally kept open by day and shut by night, being fastened by an ordinary latch and bolt. The door was fastened sometimes by the appellant and sometimes by Chambers. Neither had any right to exclude the other from the use of the front door. There was a lock, but the key had for some time been lost. Inside the front door was a passage, on the left side of which was a room occupied by the appellant, and used by him as a sitting-room and for cooking his victuals in. On the right side of the passage was a sitting-room occupied by Chambers, behind which was a kitchen, also occupied by Chambers, and access to which was gained by a door at the back of his sitting-room. At the end of the passage was a staircase, used in common by the appellant and Chambers, leading to the first floor. At the top of this staircase was a landing, on one side of which was a room occupied by the appellant, and used by him as his bed-room, and situate immediately over his other room on the ground-floor. On the other side of the landing was a room occupied by Chambers, and used by him as a bed-room. From this landing there was another flight of stairs leading to the second storey, on which were two rooms in the sole occupation of Chambers.

3. Neither the appellant nor Chambers could get from their rooms on the ground-floor to their bed-rooms on the first-floor without going out into the passage and up the staircase above referred to.

4. There was no privy or water-closet in the house; but there was a water-closet at the end of the row of houses, common to the house in question and three others.

5. The question for decision was, whether the two rooms thus occupied by the appellant did or did not constitute a dwelling-house within the meaning of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102.

6. The revising barrister decided that they did not, and therefore expunged the name of the appellant from the list. The appellant was found to be in all other respects qualified to be registered.

7. The names of twelve other persons were expunged from the list upon the same ground, and their cases consolidated with the principal case.

If the Court should be of opinion that the revising barrister was wrong, the names so expunged were to be restored to the list.

Kingdon, Q.C., for the appellant. The rooms occupied by the appellant under the circumstances stated in the case constituted a "dwelling-house" within ss. 3 and 61 of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102. Under s. 27 of the Reform Act, 2 Wm. 4, c. 45, as construed by the more recent cases of *Cook* v. *Humber* (1) and *Henrette* v. *Booth* (2), structural separation, whether vertical or horizontal, was considered necessary to constitute the subject of occupation a "house." The legislature must be assumed, when passing the Act of 1867, to have had those decisions in their minds, and to have intended to give a more clear and precise definition of the new qualification "part of a house." When, therefore, they gave the franchise to the occupier of "any part of a house used as a separate dwelling," they clearly must have meant something different from the "house" mentioned in s. 27 of the Reform Act. [He referred to Lord Coke's definition of Domus Mansionalis in 3 Inst. 64, and to the judgment of this Court in *Score* v. *Huggett*. (3)]

Lopes, Q.C., for the respondent. The legislature could not have intended to give a vote to persons occupying single rooms, or two

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

(2) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.

(3) 7 M. & G. 95.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

or more rooms on different floors, in houses other parts of which, without any structural severance, are in the occupation of other persons, all the tenants having the use of the outer door, passage, and staircase, and other conveniences in common. Under the Reform Act it is clear that the appellant could not be entitled to vote; and the only proper definition of "separate" in the Act of 1867, is, that the thing occupied must be part of a dwelling-house with all internal communication cut off from the rest of the house, and access secured to it by a separate outer door. [He referred to the judgment of Willes, J., in *Brewer* v. *M'Gowan* (1); and contended that the adoption of this definition would make the 3rd and 61st sections of the Act of 1867 consistent with the provision as to the lodger franchise in s. 4.]

Kingdon, Q.C., in reply. *Cur. adv. vult.*

April 24. The following judgments were delivered in the two cases:—

9 C.P. 305

BRETT, J. *Thompson* v. *Ward.* In this case George Herbert appeared on the list of claimants for the city of Durham, as claiming in respect of "a house." The case found that the claimant had for above a year occupied as tenant at 4*l.* 10*s.* per annum (not a house) but *one room in a house. The house*, it was stated, *consists of nine rooms*, and is let out in six several tenements. Of these, three tenants occupy two rooms each, and each of the other three tenants occupies one room. *The house* was originally built for one family. The *passage* and the *staircase*, and the conveniences, consisting of a privy and ash-pit, which latter are situated in a yard opposite the passage, are common to all the tenants. Each of the tenants has a separate coal-house in the yard. *There is an outer or street door to the passage* (i. e., as I understand, to *the passage of the house*), which is never closed, and is without lock or bolt, although it retains two staples through which a bolt formerly was and still might be shot. Each tenant has the exclusive occupation of his or her *room or rooms.* The owner does not reside on the premises.

The claim was objected to on the ground that the claimant was not an occupier of a "dwelling-house," within the meaning of the

(1) Law Rep. 5 C. P. at p. 244.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

statute 30 & 31 Vict. c. 102. The revising barrister was of opinion that "*the premises occupied by the claimant*" (he does not, it is to be observed, speak of "the room" only) were not a "dwelling-house" within the meaning of the Act, and disallowed the claim.

The question for the opinion of the Court was left in these terms:—"If the Court shall be of opinion that *the premises occupied by the claimant* were a *dwelling-house* within the meaning of the Act, his name is to be inserted in the list of voters."

It was argued on behalf of the appellant that the claimant, according to the case of *Henrette* v. *Booth* (1), would have been entitled to be registered under the old Act (2) if the premises occupied by him had been of sufficient value, and was therefore entitled under the new Act; or, if he would not have been entitled under the old Act, that the new Act was intended to alter the old Act as interpreted in *Cook* v. *Humber* (3); that, within the meaning of the new Act, every occupier must be either an occupying tenant or a lodger; that the claimant was not a lodger, because the landlord did not occupy any part of the house, and the claimant was therefore an occupying and resident tenant; that the claimant's case comes within the very words of s. 61 of the new Act, because his room, which is the tenement occupied by him, is part of a house, he alone occupies the room, he therefore occupies it separately, it is therefore occupied as a separate dwelling.

It was argued for the respondent that the premises occupied by the claimant, even if of sufficient value, would not have given a qualification under the old Act; that the new Act does not, as to the point in dispute, alter the old Act; that the claimant may be considered as a lodger, although the landlord does not occupy any part of the premises, or because the landlord in this case does occupy the passage and staircase; that the question is not whether the claimant is a lodger, but whether he occupies a dwelling-house within the meaning of ss. 3 and 61 of the statute; that it is not sufficient to shew that the claimant occupies separately, for a lodger usually occupies separately, in the sense in which the phrase was used in argument; that the tenement occupied by the

(1) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61. (2) 2 Wm. 4, c. 45, s. 27.
(3) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

claimant was part of a house, but not occupied as a separate dwelling, because, in order to use or enjoy as a dwelling-house that part of the house which is said to be his separate dwelling, he necessarily used another part of the house in common with other persons.

I am of opinion that the case of *Henrette* v. *Booth* (1), in which the circumstances were very peculiar, and which, I venture to think, trenched somewhat too closely on the so much considered case of *Cook* v. *Humber* (2), does not oblige us to hold that the tenement occupied by the claimant was a house within the meaning of the old Act. It seems to me to be entirely inconsistent with the findings in this case to say that the tenement occupied by the claimant is a house within the meaning of the old Act. It therefore seems to me that the case, as stated and argued, raises the question what is the true legal interpretation of ss. 3 and 61 of the Representation of the People Act, 1867.

Now, in the first place, in order to arrive at what is the exact point to be decided, I think it better to point out what cannot, in my opinion, be taken into consideration. Under the old Act, two separate buildings could not be joined together to make up the thing occupied, so as to make it of the value required: *Dewhurst* v. *Fielden* (3); *Powell* v. *Price*. (4) Such separate buildings as the conveniences described in this case could not have been joined to the tenement in this case, i.e., the room, or the room, passage, and staircase, to make up the value, although the fact of the use of the room, &c., being more valuable by reason of the right to use the conveniences, might have been taken into account as adding to the value of the room, &c. But the thing to be considered as the subject-matter of the occupation would have been, according to the decisions, the room alone, or the room, passage, and staircase under the same roof. It seems to me to follow that a joint occupation of such separated and external buildings as the conveniences in this case can have no effect upon the question whether the tenement, i.e. the room, &c., occupied by the claimant is so separately occupied by him as to be a dwelling-house or not within

(1) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.
(2) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.
(3) 1 M. & G. 182.
(4) 4 C. B. 105; 16 L. J. (C.P.) 139.

the meaning of the 61st section. Secondly, it does not seem to me to be necessary to determine whether the claimant is or is not a lodger. It may be that a claimant occupying a tenement does not occupy such a tenement as qualifies him to be placed on the register as an inhabitant householder, though he may not be a lodger. Thirdly, it does not seem to me necessary to consider the cases of tenements which have been structurally separated from the house of which they were once a part, or of tenements which, as originally constructed, never were part of a house. Such tenements were held to be houses within the meaning of the old Act, and are doubtless also houses within the meaning of the 3rd section of the present Act, without reference to the interpretation clause. The cases of chambers in the Inns of Court, and probably of the flats in Victoria Street,—though, with regard to these latter, which have been so often quoted as if the circumstances relating to them had been the subject of judicial decision, I should prefer to reserve my opinion until the facts are ascertained,—are, I apprehend, within the latter proposition, that is to say, they are tenements which, as originally constructed, were not parts of a house.

The question, as put forward in the present case, is in respect of a room, which is stated in the case to be a room in a house, which house was originally constructed as one house, which house is still structurally the same house as it always was, and from which the room in question has never been more structurally separated than it was in the beginning. The question, therefore, and the only question, is, whether that room is a "dwelling-house" within the meaning of the new statute.

Now, s. 27 of the Reform Act of 1832 was, after many apparently fluctuating decisions, though they have been explained to be really consistent, finally interpreted in the ruling case of *Cook* v. *Humber* (1); and in that case it was pointed out that, under a section so framed, the qualification is formed of elements,—in that case, of four elements, tenement, value, occupation, and estate. "There must be for tenement," it is said, "a house, warehouse, &c.; there must be for value annually 10*l.*; there must be occupation, that is, actual exercise of the rights of an owner in possession,

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

during the requisite time; there must be an estate in the tenement, either of fee or less. If these four distinct elements are combined in the claimant, he is qualified; if otherwise, he is not. Now, although," it is said, "they must exist in combination, in order to qualify, still, in inquiring into the existence of the combination, each element must be separately ascertained. First, is the claimant a tenant? Secondly, is he occupier? Thirdly, is the tenement sufficient in value? Fourthly, in kind?"

The 3rd section of the Representation of the People Act, 1867, so closely follows the form and structure of the 27th section of the Reform Act, 1832, and deals so entirely with a similar subject, that it seems to me impossible to deny that the qualification under it is also compounded of elements which must be combined in the claimant in order to qualify him, and that, in considering whether he is or is not qualified by such combination, each element must be separately ascertained. The elements, then, of qualification under the 3rd section are, estate, occupation, and tenement: the element of value is in this statute discarded. There must be an estate in the tenant, that is to say, a holding as owner or tenant. There must be occupation. And as to this element it seems to me useful to observe carefully how it is dealt with in the statute. It seems to me that it is completely dealt with in the 3rd section. According to that section, without referring to the interpretation section, there must be an actual exercise of the right of inhabiting in and of ownership of the house for the requisite time; and such actual exercise of right must by the proviso be the separate exercise of it, and must not be a joint exercise of it with another. The question of joint or separate occupation is completely disposed of in the section whilst dealing with the element of occupation. The remaining element the nature of which must be separately ascertained, is the tenement, or thing occupied. That is described in the section as "a dwelling-house." If there had been no other description of it in the statute, I apprehend the Court, in accordance with *Cook* v. *Humber* (1), must have held that it must be as much structurally a separate house as the "house" described in s. 27 of the former Act. I say so because the two statutes deal with a similar subject-matter, and there is an express enactment that they are to be read

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

together as one. (1) But then comes the 61st section, which enacts that "the following terms shall in this Act have the meanings hereinafter assigned to them," &c., that is to say, "Dwelling-house, shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor."

Before attempting to interpret this clause, some things should be observed in it. It may be said to be applicable, not only to s. 3, but to several other sections. If it is, the construction proposed on behalf of the claimant becomes still more difficult. I incline, however, to think that, whatever may be its interpretation, it can only be applied to s. 3. But, as applied to s. 3, I think it is most material to observe that it is a definition of the tenement, that is, the thing to be occupied; of that element, and not of the element which is called occupation, that is, the mode or manner of occupying the thing occupied.

Subject to these observations, then arises the real, and to me most difficult question,—what is the proper interpretation of this clause? I must repeat that to me this clause, which assumes to deal with the question of what the tenement occupied is to be, and to define that element alone of qualification, is a most difficult and obscure enactment. It has been suggested that it means that the thing occupied may be part of a house, provided the occupier be not a joint-occupier with some one else. If so, the words "occupied as a separate dwelling" are futile; because, by reason of the proviso in s. 3, the same result exactly would have been arrived at if the only words in s. 61 had been "dwelling-house shall include any part of a house." This alone, as it seems to me, makes it contrary to a well-known and firmly established canon of construction to give to the section the suggested interpretation. But, further, if that interpretation were adopted, it seems to me that s. 3, read in that sense, and applied as is suggested in this case, would describe exactly the position of a lodger. He may in that sense, equally with the present claimant, be said to occupy as tenant separately, that is so say, not jointly with another, part of a house. That being so, a lodger might be registered under s. 3, without reference to the element of value required by s. 4. Such a reading seems to me to make s. 3 inconsistent with the existence of s. 4. From

(1) In s. 59 of 30 & 31 Vict. c. 102.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

these considerations, I arrive at the conclusion that the suggested interpretation ought not to be accepted.

Another interpretation which was suggested on behalf of the respondent was, that the part of a house described in s. 61 must be structurally separated from the rest of the house. This interpretation is open to the objection that it gives no real effect to this 61st section, because the same interpretation would without it, by reason of *Cook* v. *Humber* (1), have been placed upon s. 3 itself. This objection is, I think, a valid one, and the clause cannot be so interpreted. The 61st section does in my opinion get rid of the necessity of a structural separation. It follows that the correct interpretation is between these two extremes. Considering always that this 61st section is dealing with the thing occupied, and not with the mode of occupying it, I think that the word "occupied" in this section has its popular meaning of "used," and is not dealing with the technical and legal idea of "occupation:" the clause should be read thus,—"Dwelling-house shall include any part of a house *used* as a separate dwelling."

The interpretation at which I feel forced to arrive is, that, although there need not be a structural separation, there must be a practical separation of *the thing occupied* from the rest of the house. The true construction seems to me to be, that the part of the house occupied by the inhabitant of it who claims to be registered, should be so situated in the house of which it is a part, and should be in such a condition, as to be capable of being *used*, and should be in fact *used*, as houses wholly separated from other houses are *used* by their inhabitants. If, in order to use or in the using of the part of the house in respect of which he claims, the claimant has stipulated for, or has accepted, the right of using, or does in fact use, some other part of the house as a part of a house, then, besides using exclusively or separately the part of the house to which he confines his claim, he uses another part jointly with others; and the part of the house for which he claims is not the part of the house which he really uses. It is only a part of that part. The part which he really uses is composed of the part to which he improperly confines his claim and the part jointly used by him and others. The part of the house which he really uses is

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

a part not used as a separate dwelling, because a part of it is used by him jointly with others. Under such circumstances, the case in my opinion is not within either the 3rd or the 61st section. I have said, improperly confines his claim, because I feel certain that, if the construction of the statute at which I have arrived be correct, a claimant cannot properly be allowed to evade the consequences of that interpretation, by claiming in respect of a part only of that which he really uses. If a claimant could reject all the uses he makes of a house except the use of the one room he is allowed or has a right to occupy exclusively, and could claim in respect of the exclusive use of that room, every inmate of a house except a servant must be taken to be the inhabitant occupier of a house within a house, though the owner of the whole house is resident in and has control over all the house but the one room. If a claimant can do this, the description of the qualification in s. 3 becomes an idle and inapplicable phrase. The present claimant, in my opinion, fails, because the part of the house which he really uses is composed of the room to which he has improperly confined his claim, and the passage and staircase which he uses in common with the other occupiers, and which passage and staircase are by the express findings in this case not parts of a street or way, but parts of the house of which the room is a part.

I think it is not unworthy of notice that the interpretation of the statute thus arrived at makes the definition of a house and of a householder under the statute consistent with the definition at common law of a house and a householder enunciated for the purpose of the franchise by the committee in the *Cirencester Case* (1), quoted by Mr. Giffard in *Cross* v. *Alsop.* (2) "Neither can a person whose habitation is composed of more apartments than one be deemed to be a householder, unless he also possesses an exclusive right to the use of the staircase, doorway, or other passage that forms the means of communication between his several apartments. The original right to an exclusive use is then the point of discrimination between the *householder* on the one hand, and the *inmate* on the other."

I am of opinion that the decision of the revising barrister was right, and ought to be affirmed.

(1) 2 Fraser, 445, at p. 449. (2) Ante, p. 319, n.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

Ellis v. *Burch*. It follows of course that I arrive at the same conclusion in the Exeter case, which is, I think, even a stronger one. The appellant there claimed to be registered as the occupier of two rooms in a seven-roomed house, for which he paid an annual rent of 6*l*. 10*s*., the other five rooms being let to one Chambers at 9*l*. 11*s*. 9*d*. per annum; the owner paying all rates and taxes, but not residing upon the premises. The facts found by the revising barrister are as follows:—[The learned judge read the second, third, and fourth paragraphs of the case.] The decision was that the two rooms so occupied by the appellant did not constitute a "dwelling-house" within the meaning of the Representation of the People Act, 1867; and the question reserved for us is, not whether one of the rooms thus occupied constituted a dwelling-house within the statute, but whether such occupation of the two rooms was the occupation of a "dwelling-house" within the statute. For the reasons I have already given in *Thompson* v. *Ward*, I think it was not, and I therefore come to the conclusion that the decision of the revising barrister in each case was right, and should be affirmed.

KEATING, J. In these cases the appellants claimed to vote, under the provisions of s. 3 of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102, as inhabitant occupiers of "dwelling-houses" within the terms of that Act. The facts were, that they resided in parts of houses, the one in two rooms, the other in one room. In each case the residence was exclusive as to the rooms, though not as to the use of the passages or all the out-door conveniences; and there was complete control over the use of the outer door or entrance to the houses. In neither case did the owner reside upon the premises; and in each case there was a separate rating of the claimant in respect of the part of the house occupied by him. The only question in each case was, whether the rooms so occupied were "dwelling-houses" within the meaning of the Act referred to.

Before the passing of the Representation of the People Act of 1867, the borough franchise in respect of the occupation of houses was regulated by the Reform Act of 1832, 2 Wm. 4, c. 45, s. 27, which confined it to the occupation of "any house" of the value of

1871

THOMPSON v. WARD.
ELLIS v. BURCH.

10*l.* per annum. Residence in the house was not necessary; it was sufficient if the residence were within seven miles of the borough in which the house was situate.

Under that statute questions frequently arose as to what constituted "a house" within the meaning of the section; and it was decided early that the subject of the qualification need not be a house in the popular acceptation of the term, but that rooms in a house, if, as it was termed, "structurally severed" from the rest, might constitute "a house" so as to satisfy the statute: but the difficulty remained as to what amounted to such a "structural severance" as would be sufficient. In *Cook* v. *Humber* (1), an attempt was made by this Court to lay down certain rules by which it was hoped the difficulty might be overcome: but the subsequent case of *Henrette* v. *Booth* (2) renders it at least doubtful how far that hope was realized. The truth seems to be that the question of "structural severance" was and continued to be one of very difficult solution, depending upon the circumstances of each case; the cases oftentimes running very closely together,—of which the two cases referred to furnish a complete illustration.

In this state of things, which must be assumed to have been within the knowledge of the legislature, they were pleased to create a new franchise, and to enact that an inhabitant occupier as owner or tenant of any "dwelling-house," without reference to value, might vote; and, as if to get rid of the difficulty of what should amount to "structural severance," the Act provides that "*any* part of a house occupied as a separate dwelling, and separately rated to the relief of the poor," should constitute a "dwelling-house" within the meaning of the Act.

Now, it appears to me that the claimants here satisfy in terms the requirements of the Act. Each occupies a part of a house as a separate dwelling, and is separately rated in respect of such occupation. But it was argued on behalf of the respondents that the claimants could not be said to occupy the rooms "as a separate dwelling," unless the dwelling constituted "a house" within the meaning of the former Act of 2 Wm. 4, c. 45, s. 27: in other words, that the later Act made no change whatever in the nature of the

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

(2) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

subject-matter of occupation for the purposes of the franchise, but only in its value; and that, when the legislature said in the one Act "a house," and in the other "any part of a house," they meant one and the same thing.

Whether there was in the present case such a "structural severance" as would constitute "a house" under the former Act, I do not inquire; because I am quite unable to accept the interpretation contended for. Indeed, the only foundation for it that I am aware of is the occurrence in the 61st section of the words "occupied as a separate dwelling," the word "house" being there dropped. But, inasmuch as the clear intention was that a *joint* occupation was not to confer the franchise, unless of sufficient value to qualify, under s. 27 of the former Act, there seems to me nothing more unnatural in expressing that purpose in the 61st section, although it had been previously provided for in the 3rd section, than in repeating the necessity for separate rating, which had already been expressed in the same previous section.

As to the exclusive use being confined to the rooms, and not extending to the passages and other means of access as well as conveniences, the franchise, even under the former Act, was consistent with such a state of things, as witness the occupation of chambers, flats, and other cases of a like description; whilst, if the intention of the legislature really was, in conferring the new franchise, not in any way to alter or affect the nature of the subject of occupation, it is inconceivable to my mind why they should not have expressed themselves differently.

It was also contended, that, inasmuch as the legislature by the 4th section of the later Act require, that, in order to entitle a lodger to vote, his lodgings must be of the annual letting value of 10*l.*, to give the franchise to the present claimants would in effect defeat the object of the 4th section, by enabling a lodger to vote out of a lodging of less value than 10*l.* But that argument seems to me to beg the question, and to assume the claimants to be lodgers within the meaning of the Act. Now, what in point of law constitutes a lodger may not always be easy to ascertain. Whether the landlord's residing on the premises be a test or not, or what other test may be applied, it is not, as it seems to me, necessary to determine, if, at all events, a man is not a lodger who has the exclusive

occupation of rooms or a room in a house where the owner neither resides or exercises any control whatever over the outer door, and who is separately rated for the subject of his occupation. And, in my opinion, whatever the correct definition of lodger may be, the claimants in the present cases are not in the position of lodgers as contemplated by the 4th section of this Act of Parliament.

Upon the whole, therefore, I think the appellants are entitled to the judgment of the Court, and that the decisions of the revising barristers ought to be reversed.

WILLES, J. I regret much the difference of opinion which exists in this case, more especially as, agreeing as I do with the opinion expressed by my Brother Brett, the result will be that, the Court being equally divided, the decision of the revising-barrister must stand, against the opinion of two of the judges.

We are not entertaining an appeal from that decision upon a question of fact, but upon a question of law, viz. whether a man who occupies two rooms, one down-stairs and one up-stairs, in a dwelling-house occupied by others who have an equal use of the staircase and outer door of the house with himself, such rooms being separately rated to the relief of the poor, is a person who occupies a separate dwelling-house, or whether he is a mere lodger who jointly occupies with others. We have no right to assume any material fact beyond those which the revising barrister has found, because by s. 42 of the Registration Act, 6 Vict. c. 18, he is to state in writing "the facts which according to his judgment shall have been established by the evidence in the case, and which shall be material to the matter in question." It was for him to decide whether in point of fact the house described in each of these cases is so divided, whether vertically or horizontally, as that the room occupied by the claimant in the city of Durham in the one case, or the two rooms occupied by the claimant in the city of Exeter in the other case, may constitute a separate dwelling-house. In each case he has found that the room or rooms so occupied are not separate dwelling-houses. The claimant has no outer door of his own. In each case it is found that there is an outer or street door, though in one case negligently kept, and that the rooms are rooms in an ordinary house occupied by persons who to my mind, and

1871

THOMPSON v. WARD. ELLIS v. BURCH.

according to the decision of this Court in *Cook* v. *Humber* (1), are persons who, for want of control over a separate outer door, are to be dealt with as lodgers, and not as occupiers of separate dwelling-houses. We are called upon to find that the room or rooms as described constitute separate dwelling-houses, which, according to the ordinary interpretation of the English language, is to find the thing that is not; we are called upon to find that to be a dwelling-house which the revising barrister has found not to be a dwelling-house. If the matter came before me as one of fact, it is possible, though not likely, that I might arrive at a different conclusion; but, to arrive at such a conclusion as matter of law only, would be expanding the facts by a construction of law which at least is doubtful: and I decline to do so. Ordinarily, at common law, and according to the common understanding of mankind, rooms in a house, the occupier of which rooms has no control over a separate outer door, do not constitute "a house." They are not "houses" within the Reform Act; neither are they "dwelling-houses" within the Representation of the People Act, 1867.

The Act which indicates what ought to be the conclusion come to in this case is the Reform Act, 2 Wm. 4, c. 45. It is a mistake to suppose that the Representation of the People Act, 1867, repeals or was intended to be a substitution for the Reform Act, except in so far as it extends the franchise, by enabling a person, who in respect of the occupation of a dwelling-house would be entitled to a vote under the Reform Act, provided the subject of occupation was of the annual value of 10*l.*, to acquire a vote even though it be not of that value, subject to certain conditions. The 27th section of the Reform Act gives the right of voting to one who occupies as owner or tenant "any house, warehouse, counting-house, shop, or other building," which of course includes a dwelling-house, though not necessarily so confined. That is the main provision in the Act of Wm. 4. Then comes the provision as to joint-occupation, which I agree with my Brother Keating is of the highest importance when looking at the Representation of the People Act, 1867. That is s. 29, which enacted that, where premises shall be jointly occupied by more persons than one as owners or tenants, each of such joint-occupiers shall, subject to certain conditions, be entitled

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

to vote in respect of the premises so jointly occupied, in case the clear yearly value of such premises shall be of an amount which, when divided by the number of such occupiers, shall give a sum of not less than 10*l.* for each and every such occupier. We have, therefore, under that Act, a general provision including a special provision as to voting in respect of a house of the yearly value of 10*l.* There is another matter which it is important to look at when we come to construe the Act of 1867. It is that, though, upon the true construction of s. 27 of the Reform Act, part of a building might constitute a house, if structurally separated from the rest, this Court has held that no lodger, whether the landlord himself occupied any part of the premises or not, or whether the lodger had a key of the outer door or not, could acquire the franchise under the Reform Act. We start therefore with this, that joint-occupiers, but not lodgers, had a right to vote under that Act.

I cannot take the view adopted by my Brother Keating, and, I believe, by my Lord also, as to lodgers. I cannot help thinking that the position of a lodger has been well defined. It was so in the masterly judgment of Erle, C.J., in *Cook* v. *Humber* (1), every word of which is applicable here. I entirely adopt it; and I think the subsequent case of *Henrette* v. *Booth* (2) is not at all inconsistent with it. I conceive it to be a judgment as conclusive as anything can be which is not demonstrated by mathematical reasoning. In *Cook* v. *Humber* (1), the appellant occupied rooms in a house which are thus described:—"The rooms on the ground-floor have doors into the house-passage or hall, which is shut off from the street by an outer door, kept closed during night and day. The rooms on the upper floor rented by him are approached by a staircase used exclusively by him, and there is no communication between such rooms and the rooms on the other side of the passage. The rest of the house is occupied by the landlord, who resides therein with his family. The appellant has a lock and key to each of his rooms, and both he and his landlord have keys of the street-door; and they are rated jointly." The question was whether the person who occupied that large portion of the house was a tenant within the meaning of the Reform Act. It was held

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

(2) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

that he was not, because there was no structural severance of the part so occupied by him from the rest of the house. All the previous decisions were there cited. The Chief Justice says (1): "We consider that the qualification fails, because the subject of occupation was not a house, but only a part of a house, without any actual severance from the residue." He then goes on to define the elements of a qualification for a borough vote; and he says: "As to the kind of tenement which qualifies, the statute has described two classes of buildings, viz. those used for residential and those used for commercial purposes,—house, for residence, warehouse, counting-house, shop, or other analogous building, for commerce. When the claim is in respect of a house, we consider that the legislature did not intend to create a part of a house used for residence, and not for commerce, a tenement sufficient to qualify. A part of a house cannot truly be said to be a house, unless the word 'house' is used in two senses. In *Judson* v. *Luckett* (2), a part of a house in one sense was in another sense a whole house, by reason of actual severance." Then, after disposing of the argument that the appellant might have been considered to be in the occupation of "other building," and observing that it had always been held that a lodger was not qualified as a householder, he refers to *Fludier* v. *Lombe* (3), where the objection to the plaintiff's vote was, that he had let part of his house in lodgings, and so was not the sole occupier; but Lord Hardwicke ruled to the contrary, and said,—"A lodger was never considered by any one as the occupier of a house; it is not the common understanding of the word; neither the house nor any part of it can be properly said to be in the tenure and occupation of the lodger." I might here add a reference to *Brewer* v. *M'Gowen* (4), in which the same doctrine was laid down in this court since the passing of the Representation of the People Act, and with reference to its construction. His Lordship then goes on (5): "Since the Reform Act, the same opinion is conveyed in the decisions holding that occupation as a lodger did not qualify. The common meaning of 'lodgings' is, a part of a house used for residence. If the legislature had intended

(1) 11 C. B. (N.S.) 41, 45; 31 L. J. (C.P.) at p. 75.

(2) 2 C. B. 197.

(3) Cas. t. Hard. 307.

(4) Law Rep. 5 C. P. 239.

(5) 11 C. B. (N.S.) at p. 46; 31 L. J. (C.P.) at p. 77.

1871

THOMPSON v. WARD.
ELLIS v. BURCH.

to make lodgers qualified, we think it would not have been left to obscure conjecture from the words 'other building.'" Every word of that is worth considering, because the Chief Justice is there speaking of part of a house occupied as a separate dwelling, which is the language used in s. 61 of the Representation of the People Act, 1867; and I entirely agree that it should not be left to obscure conjecture who is to vote in the election of members of Parliament. His Lordship then refers to *Wright* v. *Stockport* (1), where the occupation of a separate room in a cotton-spinning factory was held to qualify, because each separate room was, by reason of actual severance, with a separate outer door, an entire building in one sense, though part of the entire building (the factory) in another sense, and adds: "Assuming this to be the correct construction of the statute, the question here is brought to the point whether the rooms occupied by the appellant are a 'house.' We think that they were correctly decided by the revising barrister not to be a house within the meaning of the statute, because they formed part of a house when they were let, and there was no actual severance of the appellant's part from the other part." Considering the great care which was taken in framing the Act of 1867, I cannot help thinking that that passage was in the minds of its framers when they introduced into s. 61 the interpretation of "dwelling-house." And, though I agree in the main with the judgment of my Brother Brett, I do not see my way to the conclusion that there need not be actual structural severance, but that any practical division will suffice. I do not see how it was possible to select words which, having regard to the former Act, and to the construction which had been put upon it, could be a clearer indication of an intention to go no further as to "dwelling-house," than the legislature had previously gone as to "house." The Chief Justice goes on (2): "No authority earlier than *Score* v. *Huggett* (3) and *Toms* v. *Luckett* (4) was cited to shew that a part of a house may become a 'house,' without any actual severance, by reason of some conventional arrangement in respect of the keys of the outer door, or the pernoctation of the landlord: and the authorities are uniform to shew that, by actual

(1) 5 M. & G. 33. (2) 11 C. B. (N.S.) at p. 47; 31 L. J. (C.P.) at p. 77.
(3) 7 M. & G. 95. (4) 5 C. B. 23; 17 L. J. (C.P.) 27.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

severance, a part of a house became changed into a house, and without such severance the change would not be effected." The whole reasoning of that judgment completely dispels all doubt, and shews that the character of the subject of occupation cannot be changed by reason of the circumstance of the landlord residing or not residing upon the premises, or by the fact of the occupier of the rooms having or not having a key of the outer door. He then refers to *Monks* v. *Dykes* (1), where Parke, B., speaking of the doctrine of Lord Coke, that a chamber may be "domus mansionalis" in law (2), says that "it refers to a house divided into several chambers, with separate outer doors, and that neither in law nor in common sense can a man be said to be in possession of a dwelling-house when he is a mere lodger." And, referring to the rule as to burglary, which he says has no analogy with qualification, the Chief Justice concludes (3): "The general rule is that a part of a house, in the common understanding of the word, does not become a house in law, unless there be actual severance. In Leach's Crown Cases, 90, in the notes to *Roger's Case*, Lord Holt's opinion is reported thus:—'If inmates have several rooms in a house, of which rooms they keep the keys, and inhabit them severally, yet, if they enter into the house at one outer door with the owner, those rooms cannot be said to be the dwelling-houses of the inmates; but the indictment ought to be for breaking the house of the owner.' If the owner does not reside on the premises, the crime of feloniously breaking into the sleeping abode of a lodger in the night is precisely the same as it would be if the landlord slept there: and, in that case, it is held that the abode of the lodger may be called his 'domus mansionalis.' This exceptional rule, depending on the reasons above assigned, is no ground whatever for holding lodgings to be a 'house' within the meaning of a statute requiring the claimant of a vote to be the occupier of a house; and yet these exceptional cases were pressed on the Court in *Toms* v. *Luckett* (4) as authorities for holding that lodgings became a 'house' if the owner did not sleep on the premises."

That case of *Cook* v. *Humber* (5) appears to me to dispose of all

(1) 4 M. & W. at p. 569.
(2) 3 Inst. 65, 66.
(3) 11 C. B. (N.S.) at p. 48; 31 L. J. (C.P.) at p. 78.
(4) 5 C. B. 23; 17 L. J. (C.P.) 27.
(5) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

the arguments arising out of the landlord not residing or sleeping on the premises, and of the tenant's having or not having control over the outer door of the house, and shews that, under the Reform Act, and upon the finding of the revising barrister in this case, the rooms in question did not constitute a "house" within the meaning of that Act. It appears to me to have laid down a clear and intelligible rule. It is said, however, that doubts have been thrown upon that decision by the subsequent case of *Henrette* v. *Booth*. (1) But the Court in that case professed to adhere to their former decision; and the principle which that case adheres to shews that these rooms do not constitute a house within the Reform Act. The claimant there occupied the upper floor of a house, consisting of two rooms communicating with each other, one being used as a tailor's shop, and the other as a sitting and bed-room, and communicating with the landing on the staircase by one *outer door, over which the tenant had exclusive control.* In neither of the cases now before us is there any such finding; the claimants had no outer door other than that which was common to all the inmates. In *Henrette* v. *Booth* (1) it was a question of fact for the revising barrister whether, looking at the nature and character of the premises, the door upon the landing was really an outer door. He came to the conclusion that in point of fact it was so. The judgment of Erle, C.J., lays down precisely the same principle which he had laid down in *Cook* v. *Humber* (2); but he comes to the conclusion that, as the claimant had exclusive occupation of his rooms, and exclusive control over the outer door thereof, he was entitled to be registered. My Brother Keating says (3): "Looking at the facts found by the revising barrister, I have come to the conclusion, *though not without difficulty*, that the appellant was the occupier of a 'house' within the meaning of the 27th section of the Reform Act. The only door which the revising barrister speaks of as an outer door, is the door leading from the rooms in the appellant's occupation, and over which he had exclusive control. Practically, there was no other outer door. There is, it is true, at the bottom of the staircase a thing which is in some sense a door, but which

(1) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.
(2) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.
(3) 15 C. B. (N.S.) 511.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

wants all the essential elements of an outer door, 'having no lock or fastening of any kind, nor any means of being so closed as to secure the premises from intrusion from the street.' It is as though the outer door were taken off its hinges and left lying at the side of the door-posts. I think the revising barrister very properly abstained from calling that the outer door." If the revising barrister there had found the door at the bottom of the staircase to be the outer door of the premises, though neglected and out of repair, the learned judge would evidently have come to the opposite conclusion; and that opposite conclusion I feel bound to adopt in this case.

Thus, under the Reform Act, the occupier of a house of the annual value of 10*l.* was entitled to vote. Joint-occupiers also, provided the annual value of the house was enough to give each the annual value of 10*l.*, were entitled to vote. Lodgers had no vote. And part of a house might be a "house" within that Act, provided it was structurally severed from the rest of the building of which it formed part. Then came the Representation of the People Act 1867 (30 & 31 Vict. c. 102).

That Act did not repeal the former Act, but is to be construed with it. It enlarges the franchise in respect of dwelling-houses, but is not therefore to be so construed as to enlarge the species dwelling-house to such an extent that it could not fall within the original genus house, without express words to convey such an intention. Section 3 deals with two of the points I have referred to. It gives, by subs. 2, the franchise to the occupier, whether as owner or tenant, of any dwelling-house within the borough, irrespective of value; and requires by subs. 3 that he shall have been rated to the relief of the poor in respect of the premises so occupied by him. Then, subs. 4 contains a proviso that no man shall under this section be entitled to be registered as a voter by reason of his being a joint-occupier of any dwelling-house. A lodger does not fall within that section. This is obvious, not only from *Cook* v. *Humber* (1), but also from s. 4, subs. 2 of which gives the franchise to one who "as a lodger has occupied in the same borough, separately and as sole tenant, for the twelve months preceding the last day of July in any year, the same lodgings, such

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

lodgings being part of one and the same dwelling-house, and of a clear yearly value, if let unfurnished, of 10*l.* or upwards."

The next section to which reference may be made for the purpose of determining whether "lodger" under this and the former Act is to be differently construed, is s. 7, subs. 2 of which enacts that, "where the dwelling-house or tenement shall be *wholly* let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor-rate." I do not observe upon the *Sunderland Case* (1), though I collect from his judgment that one of the judges had this point in his mind, and that his opinion was the same as that which I entertain. The 7th section has no immediate bearing upon the decision in this case; but it may be usefully referred to for the purpose of shewing what was the meaning of the legislature. It dealt with a lodger where the owner did not dwell in the house in the sense contemplated by Lord Chief Justice Erle in *Cook* v. *Humber* (2), and so far adopted his view.

I now come to the section which is said to upset all the reasoning and the conclusion arrived at under the previous sections of the Act, viz. the interpretation clause, s. 61. This section is one which I find it very difficult to deal with. With great deference to the opinions of my Lord and my Brother Keating, I cannot think that the legislature, by the interpretation they put upon the word "dwelling-house," meant to enlarge the franchise given by s. 3 to such an extent that every man who occupies any portion of a dwelling-house,—a single room, or a cupboard, of which he is sole tenant,—shall have a right to vote as the occupier of a "dwelling-house" within that section, although no such franchise existed before either at common law or under the Reform Act. That does not appear to me to be the proper office of an interpretation clause. It would be to pervert the meaning of what had before been said in plain and unambiguous words. The language is: "Dwelling-house shall include any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor." Every one knows that a "dwelling-house" may include several separate dwelling-houses, if structurally distinct. It is clear to

(1) *Stamper* v. *Sunderland*, Law Rep. 3 C. P. 388.

(2) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

my mind that by "separate dwelling" the legislature meant a thing which is physically capable of being described as a dwelling-house,—whether the separation be practical or structural. Taking *Cook* v. *Humber* (1) as my guide, I adopt the latter expression. It must be something more than a mere room in a dwelling-house. Take the case of a common dormitory, where the space to be occupied by each tenant is marked out on the floor; is each space to be called a "separate dwelling-house?" Or, suppose, instead of a common dormitory, each tenant had a separate sleeping apartment and the use of a common refectory; would they be the occupiers of separate dwelling-houses within this Act? These are difficulties which the legislature may probably think it right to remove. The conclusion I arrive at is that the claimants in these two cases are mere lodgers, and would have votes only under s. 4, provided their holdings were of the annual value of 10*l.* and the other conditions of that section were satisfied. I think that the intention of the legislature was that the separate dwelling referred to in s. 61 must be something which could properly be called a "dwelling-house," and which is structurally, or at least practically, separated from the rest of the dwelling-house of which it forms a part,—such a dwelling-house as would have been a "house" within the Reform Act, and which answers the description of a house as interpreted by this Court in *Cook* v. *Humber*. (1) I cannot conceive it to have been intended that a man should have a vote as the occupier of a "dwelling-house" under this Act which would not have been a "house" under the Reform Act.

In *Thompson* v. *Ward*, the claimant occupied one room of a house which had originally been built for one family. There were several tenants, all of whom used the passage, staircase, and other conveniences in common. There was an outer door to the passage, though from neglect it was never closed, and was without any available fastening, though it might have been fastened. In *Ellis* v. *Burch*, the claimant occupied two rooms under similar circumstances; the only difference between the two cases being, that, in the one, there was no fastening to the outer door, whereas, in the other, there was a bolt. In neither case had the claimant

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

exclusive control over the outer door; nor was there in either any structural separation, as there was in *Henrette* v. *Booth.* (1)

Notwithstanding that I feel fully impressed with the notion that these statutes for extending the franchise ought to receive a large and liberal construction, to the extent of the fullest meaning that can fairly be attached to the words used, I am clearly of opinion that we should be going beyond the expressed intention of the legislature if we held that the claimants in these cases are the occupiers of "dwelling-houses" or "separate dwellings," within the true meaning of the 3rd and 61st sections of the Representation of the People Act, 1867.

For these reasons, I think the decisions of the revising barristers should be affirmed.

BOVILL, C.J. *Thompson* v. *Ward.* I cannot consider that the question raised upon this appeal is at all concluded by the revising barrister having called a door to the passage which was never closed, and was without lock or bolt, "an outer or street-door," or that the decision of the case depends upon the existence of such a door. The point submitted for our judgment is, whether the claimant's premises as described, including the description of the door, were a "dwelling-house" within the meaning of the Representation of the People Act, 1867.

The 3rd section of that Act gives the franchise (subject to certain qualifications) to an inhabitant *occupier as* owner or *tenant* of any *dwelling-house;* and the word "dwelling-house," it is declared by the interpretation clause, s. 61, "*shall include any part of a house used as a separate dwelling, and separately rated to the relief of the poor.*"

The legislature not having given any more precise definition of what is to be deemed a dwelling-house, this Court is called upon to say what is the proper construction to be placed upon that term as used in the statute, and upon the interpretation clause with reference to it.

In considering this question, and endeavouring to ascertain the meaning of the Act from the language in which it is framed, it is not unimportant to bear in mind what had been the decisions upon

(1) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

the Reform Act of 1832, and what was considered to be the state of the law at the time the Act of 1867 was passed.

In the Act of 1832, s. 27, the words used with reference to the borough franchise were, "every person who shall occupy as owner or tenant any *house*, warehouse, counting-house, shop, or other building," of a certain value, &c.; and upon that enactment various questions arose as to the nature of the qualifying tenement, and also as to the character of the occupation; and there were numerous decisions upon these points, especially with reference to what was to be deemed "a house or other building," and what was an occupation "as tenant," which involved the consideration of what was an occupation by a mere lodger, as distinguished from a wholly independent tenant.

It would be very difficult to reconcile the whole of these decisions; nor is it very material for the present purpose to attempt to do so. They were all carefully considered by this Court in *Cook* v. *Humber* (1), and will be found collected in the report of that case; and in the result the Court came to the conclusion that *part* of a house could not be considered as coming within the words, "other building," and that it could not be considered a "house" unless it was *structurally severed* from the rest of the building of which it formed a part. It was also considered that the question in most of these cases resolved itself into one as to the nature of the subject-matter of the occupation, rather than of the nature of the occupation of the tenement. It is also to be borne in mind, that, in buildings used for commerce, part of a house, such as a counting-house or warehouse, is, by the express terms of the Act, declared to be a qualifying tenement, although it was not so with regard to a house used for residence.

In *Cook* v. *Humber* (1) the claimant occupied as tenant one side of a house, consisting of rooms on a ground floor, and rooms on the upper floor, with a separate staircase communicating between the rooms and used exclusively by the tenant of those rooms; the entrance to the rooms being by doors to the rooms on the ground floor from the house passage or hall, which was shut off from the street by an outer door kept closed during night and day; and the claimant had a key of the street door. There was no communica-

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

tion with the rooms on the other side of the house; and the landlord occupied and resided in the rest of the house, and had a key of the street door. It was decided that the rooms so occupied by the claimant were *part of a house only*, without any actual severance from the residue, and not "a house;" that the legislature did not intend to create part of a house used for residence and not for commerce a tenement sufficient to qualify a voter; and that the claimant was therefore not entitled to the franchise as the occupier of "a house" within the meaning of that statute. The Court in that case also laid down (1) that a house might be divided by structure into several flats constituting several houses, although there was an outer door to the whole house, of which the tenants of the flats had not the key, and which was kept closed and under the sole control of a porter for the security of the tenants, and although the porter resided in one of the flats and was the owner of all the others under the same roof.

That case was followed by *Wilson* v. *Roberts* (2), where it was also held that two rooms occupied by the appellant as offices, and being the whole of the first floor, the landlord occupying the shop and residing with his family in the rest of the house, and each having a key of the street door, and the appellant's rooms not being structurally severed from the rest of the house, were a part of a house only, and not a house within the meaning of the Act.

In the year 1863, the Court had again to consider the question, in the case of *Henrette* v. *Booth*. (3) In that case, the claimant occupied the whole of the upper floor of a house, consisting of two rooms communicating with each other, one being used as a tailor's shop, and the other as a sitting-room and bed-room, and communicating with the landing on the staircase by one outer door, over which the tenant had exclusive control. The other floors were occupied by other tenants. There was a common staircase; and at the entrance from the street was a door open all day, but generally allowed to swing to at night, but having no lock or fastening of any kind. The previous decisions were again carefully considered; and the Court, adhering to their decision in *Cook* v.

(1) 11 C. B. (N.S.) at p. 44.
(2) 11 C. B. (N.S.) 50. 8 Jur NS 749 (US C & Jur NS. 700
(3) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61. 9 Jur NS 1193

1871

THOMPSON v. WARD. ELLIS v. BURCH.

Humber (1), came to the conclusion and decided that the claimant was the occupier of a house within the meaning of the statute, the floor occupied by him being severed horizontally from the rest of the house as completely as in the case of chambers in the Inns of Court, where there was sometimes the additional circumstance of an outer door, and sometimes not; Erle, C. J., adding: "The party has exclusive possession of the floor occupied by him, and exclusive control over the outer door of the floor:" and he repeated what had been previously stated, that the nature of the tenement could not depend on the presence or absence of the landlord, or the possession of a key of the outer door to the street. In that case my Brother Keating was also of opinion that the door to the street could not properly be considered an outer door: and I am of the same opinion as to the door in this case.

In these cases, the Court found it extremely difficult to define in language what was "a house" within the meaning of the Act, or what was such an actual severance within the meaning of their own decisions as would constitute part of a house "a house" for the purpose of the franchise.

When the Representation of the People Act, 1867, was passed the term "dwelling-house" was introduced; but the legislature equally abstained from defining what was a dwelling-house, except by declaring in the interpretation clause that the term "dwelling-house" should include "any part of a house occupied as a separate dwelling, and separately rated to the relief of the poor."

The principal difficulty under the former Act was to determine when part of a house was to be considered only part of a house, and when it was to be considered "a house" within the meaning of that Act, and which had to be determined with reference to its structure and its severance from the other parts of the building. This was a difficulty with respect to the *nature of the tenement* which was the subject of occupation: and, when the last Act was passed, and the legislature enacted that a dwelling-house should include any part of a house, it would seem to have been with th express intention of avoiding the difficulties that had arisen as to when *part* of a house was to be considered a *house*, and, so far as the *subject of occupation* was concerned, to make it immaterial for

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

the future whether the part of the house was to be considered a "house" or not. The legislature, however, at the same time, by adding the words "occupied as a separate dwelling," introduced a qualification with respect to the *nature of the occupation*, as distinguished from the *subject of occupation*; thus making the *part* of a house a sufficient *tenement*, and putting it upon the same footing as an entire house, provided it was occupied in the manner and for the purpose specified, viz. as a separate dwelling, and was separately rated. Part of a house, if used as a warehouse, counting-house, or shop, was a sufficient tenement for the purpose of the borough franchise under the Act of 1832; and the Act of 1867 seems to me to place part of a house occupied as a separate dwelling upon the same footing.

We next have to consider the effect of the words "occupied as a separate dwelling." These words appear to me, as I have already observed, to point to the nature and purpose of the occupation: and an occupation for mere professional purposes is not sufficient: *Cuthbertson* v. *Butterworth.* (1) They cannot mean that there is to be an absolutely separate dwelling consisting of what is commonly or legally considered an entire house, because the tenement to which the words refer is described as *part* of a house used as a separate dwelling,—meaning, I apprehend, that the *part* must be used as a separate dwelling. The words "separate dwelling," again, seem to require that the occupation as a dwelling must be separate as distinguished from a joint occupation. There must also, for the purpose of obtaining the franchise under s. 3 of the Act of 1867, which in this respect corresponds with s. 27 of the Act of 1832, be an occupation by the occupier as *owner* or *tenant*. Under the former Act, a person who occupied as a *lodger*, though in one sense a tenant, was not considered to occupy as owner or tenant within the meaning of that Act; and the same rule must prevail under the late Act, more especially as the franchise is now by s. 4, under certain conditions, given to lodgers in respect of their lodgings.

In the case submitted to us by the revising barrister, no question is raised as to the room of the claimant being occupied by him as a tenant; and the question really turns on whether such room is to be considered "*part of a house occupied as a separate dwelling.*"

(1) Law Rep. 4 C. P. 523.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

Now, it is *part of a house*, and it is occupied by the claimant alone, and not jointly with any other persons, and for the purpose of his residence or dwelling, and, as it seems to me, of his separate dwelling, and as an independent tenant. It is also found (whether rightly or not, we are not at liberty upon this case to inquire,) to have been separately rated to the relief of the poor; and I am therefore of opinion that it must be considered a "dwelling-house" within the meaning of the 3rd section, as explained by s. 61 of the Act of 1867.

In this particular case, it also appears to me that it may very well be contended that the room of the claimant was in contemplation of law a *dwelling-house* of itself, independently of the interpretation clause, as well as *a house* within the meaning of the Act of 1832; and, as this point was elaborately argued before us, and may arise in other cases, I will state my views upon it.

It is quite clear that *part* of a house, even a single room, may properly and legally be considered and described as *a house* or *dwelling-house*. For instance, Lord Coke, in treating of burglary, in 3 Inst. 64-65, says: "A chamber or room, be it upper or lower, wherein any person doth inhabit or dwell, is domus mansionalis in law;" which Parke, B., explains, in *Monks* v. *Dykes* (1), to refer "to a chamber under certain circumstances, viz. when a house is divided into several chambers, with separate outer doors." In that case Lord Abinger also makes the remark that "a room within a house may be a dwelling-house or it may not." In *Lee* v. *Gansel* (2), where the question was as to the right of bailiffs to break open the door of a room occupied by a lodger within the house, Lord Mansfield, after referring to the case of chambers in the Inns of Court and in colleges, opening upon a common staircase, as being *clearly several houses*, adds: "So, if that which was one house originally comes to be divided into separate tenements, and there is a distinct outer door to each, they will be separate houses, as, Newcastle House." So, in *Reg* v. *Eye* (*Mayor*), *In re Evans* (3), Littledale, J., says: "If there be no landlord residing in a house, half a dozen different persons may be stated to have dwelling-houses within it." And the other judges thought the fact of the doors opening upon a

(1) 4 M. & W. at p. 569.

(2) Cowp. 1.

(3) 9 Ad. & E. 679.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

common staircase made no difference; Coleridge, J., remarking that the passage was no more than part of the street. The following may also be mentioned as familiar instances of parts of houses being considered houses, viz. chambers in the Albany, chambers in the Inns of Court, rooms in the colleges at the universities, shops in the Burlington Arcade, flats in Victoria Street, apartments in Hampton Court Palace.

The decisions in *Cook* v. *Humber* (1) and *Henrette* v. *Booth* (2), and the cases there cited, are also conclusive to shew that a single room may be a *house* or *dwelling-house* of itself, for the purpose of the parliamentary franchise. They also establish that the existence of an outer street door to the house, in addition to the outer door of the tenant's chamber, even although the tenant have not the key of it, and the street-door is kept locked by a porter who resides on the premises, or even the landlord himself residing on the premises, would not prevent the room being legally a house of itself, provided it be structurally severed from the other parts of the house, and provided the tenant has an outer door of his own to his room, and has the complete control over that door.

It seems to me to be very difficult to distinguish this case in principle from many of those which have been referred to. In the present case, the room of the claimant is his sole residence and dwelling-place: structurally it is divided from and does not communicate with the rest of the house: there is nothing, in my opinion, which can properly be considered an outer door, except the door to his own room, over which he has complete control; and, though he has the use only of the staircase and some other conveniences in common with the other occupiers, if it were necessary to decide the point, I should be disposed to consider that his room was *a house* of itself, within the meaning of the Act of 1832, and a *dwelling-house* of itself, within the Act of 1867, independently of the interpretation clause in the latter Act.

It is tolerably clear, however, that, where a whole house is let out in apartments, as in the present case, it was not the intention of the legislature that each of the occupiers of these apartments should acquire the franchise, because *being rated* was a necessary

(1) 11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73.

(2) 15 C. B. (N.S.) 500; 33 L. J. (C.P.) 61.

1871

THOMPSON v. WARD.

ELLIS v. BURCH.

part of the qualification, and under the exception in the 7th section of the Act of 1867, in such cases, unless the apartments were separately rated at the time the Act was passed, the *landlord*, and *not the occupiers*, was required to be rated. In this case, the occupiers are found to have been rated, and no question is submitted to us on that point: but it may well be doubted whether they could properly be so rated, unless the apartments were separately rated at the time of the passing of the Act of 1867, and whether the provisions of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict c. 41), at all apply to cases where the occupier was not then liable to be rated, and where consequently there could be no rating of the owner *instead of the occupier* under that Act. If the question of rating had been raised, it is not improbable that this case would have been found to come within our decision in the late case of *Cross* v. *Alsop* (1), decided in last Michaelmas Term, so that the claimant would not be entitled to remain on the list of voters.

Another question which was argued at great length, and which indirectly arises, though it is not directly raised by the case submitted to us, is, whether the claimant is to be considered a mere lodger. Generally speaking, a lodger is a person whose occupation is of part of a house, and subordinate to and in some degree under the control of a landlord or his representative, who either resides in or retains the possession of or a dominion over the house generally or over the outer door, and under such circumstances as that the possession of any particular part of the house held by the lodger does not prevent the house generally being in the possession of the landlord.

Where a landlord resides in part of a house, and there is an outer door from the street, and he by himself or his servants has the control of this outer door, and undertakes the care or control of rooms let to other persons and the access to them, and those rooms themselves have not anything in the nature of an outer door, and are not structurally severed from the rest of the house, there could be little hesitation in saying that an occupier of those rooms, being part of the house, is only a *lodger*. On the other hand, if there be no real outer door to the street, and neither the

(1) Ante, p. 315.

landlord nor his servants, nor any one representing him, occupies any part of the premises, or exercises any control over any part of them, and the rooms occupied by another person are structurally severed from the rest of the house, and have an outer door to the general landing or staircase, and no one but such tenant has or exercises any care or control over the rooms or *that* outer door, as a general proposition, the person so occupying those rooms could *not* properly be said to be a lodger. It is always important, in determining whether a man is a *lodger*, to see whether the owner of the house retains his character of master of the house, and whether he occupies a part of it by himself or his servants, and at the same time retains the general control and dominion over the whole house; and this he may do, though he do not personally reside on the premises.

These views are borne out by the judgment of Maule, J., in *Toms* v. *Luckett* (1), which was confirmed by my Brother Willes in the recent case of *Smith* v. *Lancaster*. (2) They are also in accordance with many authorities where the occupation by a lodger of part of a house or premises has been held not to deprive the landlord of the general possession of the whole house: see, generally, per Lord Hardwicke, in *Fludier* v. *Lombe* (3); per Lord Mansfield, in *Lee* v. *Gansel* (4); also *Reg.* v. *Mayor of Eye* (5); and the recent cases of *Brewer* v. *M'Gowan* (6) and *Smith* v. *Lancaster*. (2)

In *Stamper* v. *Sunderland* (7), the Court decided that, where a house was wholly let out in apartments, as in the present case, and the several occupiers were not separately rated at the time the Act passed, *the owner* was, by the express terms of s. 7 of the Representation of the People Act, 1867, the proper party to be rated, and that the occupiers of the several rooms could not properly after the passing of that Act be rated in respect of their separate occupations. I was of opinion in that case, as each tenant of a room had the sole and exclusive occupation and control over it, although he had the use of the staircase and some other parts

(1) 5 C. B. 23; 17 L. J. (C.P.) 27.
(2) Law Rep. 5 C. P. 2[illegible]. 46/
(3) Cas. t. Hard. 307.
(4) Cowp. 1.
(5) 9 Ad. & E. 670.
(6) Law Rep. 5 C. P. 239.
(7) Law Rep. 5 C. P. [illegible]. 3/388

1871

THOMPSON v. WARD. ELLIS v. BURCH.

of the house in common with the other tenants, and as neither the owner or landlord nor any person representing him resided in or occupied any part of the house, that these tenants of the rooms must be considered as occupiers of separate tenements for rating purposes, and that each room must be considered a separate and independent dwelling-house or tenement: and I see no reason to change that opinion. My Brothers Byles and Montague Smith were also of opinion that the tenants would under the statute of Elizabeth have been liable to be rated, if no other legislation had intervened. My Brother Smith, no doubt, intimated an opinion that such persons might be lodgers and their rooms lodgings within the meaning of s. 4 of the late Act; and a similar argument was urged before us in this case. But the 4th section, on which the lodger franchise depends, was not then under consideration; and the 7th section being only a rating clause, and its language apparently taken from Sturges Bourne's Act, 59 Geo. 3, c. 12, s. 19, I think the language of that section has little effect upon the construction to be placed on the franchise clause of the Act.

Some stress was laid upon the words "wholly let out in apartments or lodgings" in the exception to the 7th section including cases where the landlord did not reside upon the premises: but I do not think this argument is entitled to much weight, because "apartments" is a proper term to apply to rooms in a house constituting separate houses in themselves, as was said by Maule, J., in the case of *Score* v. *Huggett* (1), and rooms may also be *lodgings*, where, although the landlord does not reside upon the premises, he retains the general control over the house and the outer door.

In this case, the landlord has no control or dominion over the house or over the outer door. He is not, I think, in any sense the occupier of the house; nor can the possession of the occupiers of the rooms be deemed his possession or occupation of the house generally. I think it cannot properly be said that there is any occupier of the whole house; no one tenant having any control over the house generally beyond the others: nor can the whole of the tenants in any sense be considered as joint-occupiers of the house: and I am of opinion that each tenant is the occupier of his own room only in the independent position of a tenant, and that

(1) 7 M. & G. 95.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

his occupation is not subordinate to that of any other person, and is not the occupation of a mere lodger.

As I have already intimated, I think it was not the intention of the legislature in the Act of 1867 that persons occupying separate rooms in a house where the whole was let out in separate apartments should have votes, because under that Act rating was made an essential part of the qualification, and by the same Act such persons could not be rated unless they were separately rated at the time when the Act was passed. The general question of the right of such persons to the franchise is not, however, raised by this case, upon which the only point submitted for our determination, and which we have to decide, is, whether the premises occupied by the claimant were a dwelling-house within the meaning of the Act.

Upon that question it seems to me that the legislature intended to make "any part of a house," as distinguished from a whole house (in the sense in which the term "house" had been previously interpreted by the Courts), a sufficient subject of occupation, provided it was occupied for the purpose of a dwelling, and as a separate dwelling in the sense of the occupation not being a joint occupation with others of that particular part of the house, and provided there was a wholly independent occupation as distinguished from that of a mere lodger, and the part of the house was separately rated. The room of the present claimant was part of a house, and the nature of his occupation in this case seems to me to fulfil the other conditions; and, it being found that he was separately rated, I am of opinion that he must for the purposes of this appeal be considered the occupier of a dwelling-house, and that his premises must be considered a dwelling-house within the meaning of the Act of Parliament, and that the decision of the revising barrister disallowing the claim to vote ought upon this point to be reversed.

The Court, however, I regret, is equally divided in opinion as to the proper interpretation of the words "any part of a dwelling-house occupied as a separate dwelling," in the interpretation clause; and the result will be that the decision of the revising barrister in this case must stand.

It is very unfortunate that there should be this difference of opinion as to what was intended to be a sufficient subject of occu-

1871

THOMPSON v. WARD. ELLIS v. BURCH.

pation under the Act: and, as we have been unable to determine the meaning of the words in the statute, it may be for parliament to consider whether it will pass a declaratory Act in order to define more clearly what was intended to be included under the term "dwelling-house," and who is to be considered a "lodger."

The difference of opinion which unfortunately exists upon this subject is practically of less importance than it otherwise might have been in this and other similar cases, as affecting the franchise generally, because, according to the decision in the *Sunderland Case* (1), unless their apartments were separately rated when the Act was passed, these occupiers could not properly under the Act of 1867 be rated to the relief of the poor; and the Act of 1869 (32 & 33 Vict. c. 41), which dispenses with the necessity of rating in certain cases, would therefore probably be found to have no operation upon their cases, according to the decision in *Cross* v. *Alsop* (2); and, if so, then, upon an objection being raised to the votes on the point of rating, the claims of these persons to be upon the register ought to be disallowed.

Ellis v. *Burch.* This case differs in its circumstances in some respects from that of *Thompson* v. *Ward:* and, if the decision had depended upon the nature of the tenement occupied and the necessity of there being a structural severance of the part of the house used as a separate dwelling, I should have been of opinion that there was no such structural severance in this case. But, in the view which I take of the construction of the present statute, that point does not arise.

Although these rooms would not in my opinion, according to the authorities, constitute a *house* of themselves, yet they are, I think, *part of a house*, and, with regard to the nature and purpose of the occupation, they are, as it seems to me, used and occupied as a dwelling, and as a separate dwelling, within the interpretation clause of the Act of 1867; and, being found to have been separately rated (whether rightly or otherwise is not now in question), they are in my opinion a dwelling-house within the meaning of the 3rd section of the Act of 1867. I think, therefore, upon this case, and upon the point submitted to us, that the decision of the revising barrister ought to be reversed.

(1) Law Rep. 3 C. P. 338. (2) Ante, p. 315.

1871

THOMPSON v. WARD. ELLIS v. BURCH.

I may add that, in this case also, it appears to me that the claimant was the occupier of the rooms in question as an independent *tenant*, that his occupation was not subordinate to that of any other person, and that no other person had the general occupation or control of the house or outer door, or any dominion over him or the rooms which he occupied, or the outer door of those rooms, and that the claimant under these circumstances occupied as a *tenant*, and not as a *lodger*, and that his rooms were not lodgings within the meaning of the franchise clause of the Act of 1867.

As the same difference of opinion, however, exists upon the Bench in this case as in *Thompson* v. *Ward*, the decision of the revising barrister will stand.

Decisions affirmed.

Thompson v. *Ward*, Attorneys for appellant: *Hill & Hoyle.*
Attorneys for respondent: *Sharp & Ullithorne.*

Ellis v. *Burch*, Attorneys for appellant: *Coode, Kingdon, & Cotton, for T. Floud, Exeter.*
Attorney for respondent: *G. E. Philbrick, for Burch & Barnes, Exeter.*

ABEL, APPELLANT; LEE, RESPONDENT.

Jan. 19.

Parliament —Borough Vote—Payment of Rates—30 & 31 *Vict. c.* 102, *s.* 3, *subs.* 4—*Payment excused by Reason of Poverty*—54 *Geo.* 3, *c.* 170, *s.* 11.

A. claimed, in 1870, to be placed on the list of inhabitant occupiers under s. 3 of the Representation of the People Act, 1867. His landlord was rated to the relief of the poor in respect of the qualifying premises to all the rates made within the year. A previous rate, in which A. was rated, had been made in June, 1869, from payment of which he was, in October, 1869, excused by the justices, under 54 Geo. 3, c. 170, s. 11:—

Held, that A. had not bonâ fide paid "an equal amount in the pound with that payable by other ordinary occupiers, in respect of *all* poor-rates that had become payable by him in respect of the qualifying premises up to the preceding 5th of January," within 30 & 31 Vict. c. 102, s. 3, subs. 4, and was therefore not entitled to be registered.

APPEAL from the decision of the Revising Barrister for the city and borough of New Sarum.

Frederick Abel claimed to be inserted in the list of inhabitant occupiers, under the provisions of 30 & 31 Vict. c. 102.

1871

ABEL v. LEE.

1. It was established before the revising barrister that Abel was duly qualified on the 31st of July, 1870, to be registered, unless he failed to be qualified, for the following reason:—

2. On the 18th of June, 1869, a poor-rate was duly made and allowed by the justices, for the several parishes within the city and borough of New Sarum.

3. Abel was duly rated to the said poor-rate in respect of the qualifying premises; and the amount thereof thereupon became payable from him in respect of the same; but he has never paid the said rate, or any part thereof.

4. The next poor-rate was made in the month of October following, when the owner of the qualifying premises was rated to the said October rate in the place of Abel: and the owner has since been rated to all subsequent poor-rates, under the provisions of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41).

5. Subsequently to the last-mentioned rate of October, 1869, becoming payable, Abel was duly excused by order of justices from payment of the said poor-rate of the 18th of June, 1869, under the provisions of the 54 Geo. 3, c. 170, s. 11.

6. The revising barrister held that Abel was not entitled to be inserted in the list. He so decided on the ground that, notwithstanding the said excusal, he had not on or before the 20th of July in this year bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers, in respect of all poor-rates that had become payable by him in respect of the qualifying premises, within 30 & 31 Vict. c. 102, s. 3, subs. 4.

The cases of seventy-three other claimants, whose circumstances were similar to those of the principal claimant, were consolidated.

Wills, for the appellant. The question turns upon the construction of s. 3, subs. 4, of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), which, to entitle the claimant to be registered, requires that he shall have paid on or before the 20th of July an equal amount in the pound to that payable by other ordinary occupiers, of "all rates that have become payable by him in respect of the premises up to the preceding 5th of January." By s. 19 of 32 & 33 Vict. c. 41,

rating of the owner of the premises is for the purpose of the franchise to be deemed a rating of the occupier; and here, the owner having been rated to the rate made in October, 1869, which rate was, by s. 17 of that Act, "payable" as soon as made, there was no rate payable by the appellant within the qualifying period, viz. between the 31st of July, 1869, and the 5th of January, 1870.

[BOVILL, C.J. The 19th section of 32 & 33 Vict. c. 41 applies only to cases which fall within the general scope of the Act: see *Cross* v. *Alsop.* (1)

WILLES, J. The 4th subsection of s. 3 of the Act of 1867 is quite general. Supposing the claimant had paid all the rates made during the qualifying year, would he not be still in arrear of the rate made in June, 1869? If so, he has not paid "all rates that have become payable by him in respect of the premises up to the 5th of January," 1870.]

He has (constructively) paid all rates that became payable by him within the qualifying period. The excusal of the June rate under s. 11 of 54 Geo. 3, c. 170, is equivalent to payment. The words of that section empower the justices "to order and direct that such person [i. e., a person proved to be unable through poverty to pay the rate] shall be excused from the payment of such rate or cess, and to strike out his or her name from the rate:" and it goes on to provide that, "the sum at which such person was so rated in such rate or cess shall not thereafter be collected, or any person or persons charged therewith, or in any manner called or liable to account for the same, or for omitting to collect or receive the same." To hold that a person who has once been excused from payment of a rate is disqualified from voting until he has paid it, would be to disqualify him for ever. The demand upon him is struck out of the rate, and there is no person to whom it could be paid: nor could the owner be called upon to pay the rate: *Rex* v. *Hull Dock Company.* (2)

[BRETT, J. The language of subs. 4 of s. 3 of the Act of 1867, like that of s. 27 of the Reform Act (2 Wm. 4, c. 45), and of the 11 & 12 Vict. c. 90, would seem to require that *all* rates should be paid. And the form of notice given in Sched. E. to the Represen-

(1) Ante, p. 315. (2) 5 D. & R. 359.

1871

ABEL v. LEE.

tation of the People Act, 1867, is equally general in its terms, and would obviously include all arrears. I have always understood the spirit of the legislation on this subject to be that all persons who are so poor as to be unable to pay rates are to be disqualified to vote.

MONTAGUE SMITH, J. The rate made in June, 1869, was due and payable from the claimant within the qualifying period. The excusal was subsequent to the making of the October rate.

BOVILL, C.J. Under s. 27 of the Reform Act, the rating is to be within the year; but, when it speaks of payment, the words are, "*all* the poor-rates which shall have become payable from him in respect of such premises previously to the 6th of April then next preceding,"—now 5th of January.]

The condition of payment is confined, it is submitted, to rates made within the qualifying period, that is, made and allowed: *Jones* v. *Bubb.* (1)

The respondent did not appear.

BOVILL, C.J. There is a very marked distinction between the 4th subsection of s. 3 of the Representation of the People Act, 1867, which relates to the payment of poor-rates, and the preceding subsection, which refers to the time for which the party must be rated; and one would naturally suppose that this distinction was intentional. The period of occupation which is necessary to qualify is twelve months next preceding the last day of July in any year, and the party must during the time of such occupation have been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises. But, when the legislature comes to deal with the period for which the rates are to be paid, there is no such limit; the claimant must, on or before the 20th of July, have bonâ fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of *all* poor-rates that have become payable by him in respect of the said premises up to the preceding 5th day of January. I think we are bound to assume that the legislature intentionally made this difference. If it had intended to make it compulsory to have

(1) Law Rep. 4 C. P. 468.

paid only such rates as were made within the qualifying year, it would no doubt have said so. If the matter had rested upon that enactment alone, I should have entertained very little doubt. But, when we come to look at the Reform Act of 1832 (2 Wm. 4, c. 45), it seems to me to be clear beyond the possibility of dispute. Section 27 required an occupation as owner or tenant for twelve calendar months next previous to the last day of July. That period having been specified, the section goes on to provide that the party shall have been rated in respect of the premises to all rates "made during the time of such his occupation so required as aforesaid,"—a provision which corresponds precisely with the analogous provisions in s. 3 of the Representation of the People Act, 1867. Then we come to the further requirement in s. 27, viz. that "such person shall have paid on or before the 20th day of July in such year," not "all poor-rates, &c., which shall have been made during the time of such occupation," but "all the poor-rates, &c., which shall have become payable from him in respect of such premises previously to the 6th day of April then next preceding." A further observation arises upon this Act, viz. that it also required payment of the assessed taxes, which could not mean those assessed during the qualifying year, seeing that the financial year commences on the 5th of April. It seems to me, therefore, to be manifest that the legislature by that enactment intended that all rates and taxes, whether imposed during the qualifying year or not, should have been paid before the time specified, in order to secure the franchise; and I think that with respect to poor-rates the same construction ought to be put upon the corresponding provision in s. 3 of the Representation of the People Act, 1867. The 35th section of the Registration Act of 1843 (6 Vict. c. 18) favours this view: it requires the overseers to attend the courts of revision, and impowers the revising barrister to require "any overseer or overseers of a past year, or other person having the custody of any poor-rate of the then current or any past year," to attend before him and answer all such questions as he may put to them. This seems to shew that it may be material that rates made prior to the qualifying year should be produced: and ss. 28 and 29 of 31 & 32 Vict. c. 58 contain similar enactments as to counties. Further, s. 28 of the Act upon which this question

JC 231

JC 233

1871

ABEL v. LEE.

arises (30 & 31 Vict. c. 102) enacts that, "where *any* poor-rate *due* on the 5th of January in any year from an occupier in respect of premises capable of conferring the franchise for a borough remains unpaid on the 1st day of June following," the overseers are to give such occupier a notice in the form given in Sched. E.; and the operative words of that notice are, "You will not be entitled to have your name inserted in the list of voters for, &c., unless you pay, on or before the 20th day of July next, *all the poor-rates which have become due* from you in respect of such premises up to the 5th day of January last," &c.,—not confining it to rates made during the qualifying year, but referring generally to *all* rates which have become due from the party. Looking at these several enactments, I come to the conclusion that the true meaning of subs. 4 of s. 3 of the Representation of the People Act, 1867, is, that *all* poor-rates assessed in respect of the qualifying premises up to the 5th of January must be paid, whether assessed during the period of occupation prescribed by the Act or not. It is said that this might, in a case like the present, amount to a perpetual disqualification. I do not think that necessarily follows: but, at all events, the argument is inapplicable here; for, the June rate was clearly payable within the qualifying period, the claimant not having been excused from it until October, 1869. Besides, I do not think the legislature in 54 Geo. 3, c. 170, s. 11, has put an excusal upon the same footing as a payment. At all events, when the question as to its operating a perpetual disqualification fairly arises, it will be quite time to consider it. At present I desire to be understood as not expressing a final opinion. It is enough to say that subs. 4 of s. 3 of the Representation of the People Act, 1867, is without qualification of any kind: all rates must be paid. I therefore think the decision of the revising barrister is right, and that the appeal must be dismissed.

WILLES, J. I am of the same opinion. The question is, what is meant by the expression in subs. 4, s. 3, of the Representation of the People Act, 1867, "all poor-rates that have become payable" by the claimant "up to the preceding 5th day of January,"—does it mean all poor-rates which were made and became payable between the 31st of July and the 5th of January following? or does it

1871

ABEL v. LEE.

mean generally all poor-rates which were in arrear on the 5th day of January? Some light is thrown upon that question by s. 29 of the Act, which requires the overseers to make out a list of every person who shall not before the 20th of July have paid "all poor-rates which shall have become payable from him in respect of any premises within the said parish before the 5th day of January then last past." That section is quite general, and is not even connected with the twelve months limitations in the earlier subsections of s. 3; and, dealing as it does with a matter of account, it is to be assumed that, according to the ordinary mode of keeping an account, the list would have to include all the poor-rates for which the party had become liable and which had not been paid. I have no hesitation, therefore, in concurring with my Lord, that not only the ordinary signification of the words used in subs. 4 of s. 3, but also the other sections of the Act which have been referred to, shew that the more general and extensive meaning is that which the legislature intended should be put upon the words in question. Mr. Wills does not contend that that would be so on the words alone; but he says that the absurdity which would follow from adopting such a construction is so great that we ought, in order to avoid that absurdity, to qualify the strict grammatical construction. No doubt the general rule is that the language of an Act of Parliament is to be read according to its ordinary grammatical construction, unless so reading it would entail some absurdity, repugnancy, or injustice. One recognises that rule where the repugnance arises between the words of the section to be construed and those of some other section in the same Act or in some other Act which is in pari materiâ with it. But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act of Parliament in order to bring it in accordance with his views as to what is right or reasonable. No such duty is imposed upon him. Mr. Wills says that, if we give the words of subs. 4 of s. 5 their strict grammatical construction, this absurdity will follow, viz. that the claimant will lose his franchise for ever; and this absurdity, he urges, is apparent on a comparison of the words in question with those of 54 Geo. 3, c. 170, under which the appellant was excused from the payment of the June rate; and he contends that, in order to prevent that absurdity, we ought

GEP 299

1871

ABEL
v.
LEE.

JCP 231

to modify the language of the later Act. That may be a very good argument for modifying the effect of the Act of Geo. 3, but it affords no ground for modifying the Act of the Queen. The 11th section of 54 Geo. 3, c. 170, can only come into operation on the application of the party himself. Assuming that the appellant is in the condition of not being able ever to vote in respect of the house he occupies, by reason of this particular rate remaining unpaid, it must be remembered that he is brought into that position by his own voluntary act, and not by the act of the legislature. And if that be so, and it amounts to an absurdity, what is the result? Why, that s. 11 of the Act of Geo. 3 is to be held to be like some of the early Bankrupt Acts, which simply discharged the party's legal liability for his debts, but did not discharge the moral duty to pay, or invalidate a subsequent promise. So, here, it may be that the appellant may still tender the unpaid rate to the overseers, and that they may be justified in receiving it: and this may be the true mode of escaping the absurdity suggested. Moreover, it is a mistake to suppose that the non-payment of the rate in question will necessarily operate a perpetual disfranchisement. The party was excused from payment of a rate imposed upon him in respect of his occupation of a particular house. He may afterwards become able and willing to pay his way; and the notion of a perpetual disfranchisement assumes that he will always occupy the same premises. When we recollect the first principle of legislation, which is to enact laws which will meet the cases which most frequently arise, all notion of the special absurdity and injustice supposed to exist in this case will evaporate. I may add that, if we applied any modification to the construction of subs. 4, of s. 3, I am not satisfied that we could put any qualification on its language which would exclude from it the present rate; for, I think my Brother Smith hit the bird in the eye when he pointed out that there was a period within the qualifying year during which the appellant might and ought to have paid it. It is not the fact that he did during the qualifying year (if that is the period we ought to introduce in the subs.) pay an equal amount in the pound to that payable by other ordinary occupiers, in respect of all poor-rates that had become payable by him in respect of the qualifying premises. The case appears to me to be a per-

fectly clear one. The decision of the revising barrister must be affirmed.

1871

ABEL v. LEE.

MONTAGUE SMITH, J. I also think that the decision of the revising barrister was right; and I agree with my Brother Willes that the case is a very plain one. The qualification of borough voters is to be found in s. 3 of the Representation of the People Act, 1867. The present question turns entirely upon the construction of subs. 4 of that section. It was contended by Mr. Wills that that part of the section requires as one test of qualification the payment of such poor-rates only as are made within the qualifying year. The legislature, however, has not thought fit so to provide. The 3rd subsection of s. 3 requires that the party shall have been rated as an ordinary occupier to all rates made for the relief of the poor during the twelve months next preceding the last day of July. If the legislature had intended that the payment should be confined to the rates made during the same period, one would have expected to find words to that effect. There are, however, none. There is a manifest change in the language, and we must assume in the intention also. Mr. Wills did not and could not contend that there is anything in the words of subs. 4 to limit the payment to the rates made within the qualifying year. His argument was, that, if we held them to apply to the payment of rates generally, the consequence would be that a man who was excused from paying a rate five years ago might be deprived of the franchise, notwithstanding he might subsequently have paid all the rates imposed upon him except that one. Such a consequence might have been intended. But I must confess I do not see that it is the necessary consequence of this legislation. So far as the present case is concerned (as I threw out in the course of the argument), it may be that subs. 4 is limited to rates which remain payable during any part of the qualifying year; or it may be that it is competent to the party to retrieve his position by a subsequent payment of the rate from which he has been excused. It is unnecessary, however, to decide either of those questions now: it is enough to say that it is not plain that the consequence pointed out by Mr. Wills really exists; and, if it does exist, it may be contrasted with the construction adopted by my Brother Willes.

1871

ABEL v. LEE.

The consequence of adopting the argument of Mr. Wills would be to affect the rights of all persons claiming the occupation franchise; whereas, the contrary construction would affect only a small number of persons, viz. those who avail themselves of the provision in the 54 Geo. 3, c. 170. I agree that the decision of the revising barrister was right.

BRETT, J. The question raised before the revising barrister and argued here is, whether the claimant was disentitled to be put upon the list of voters for the borough of New Sarum, because he had failed to pay on or before the 20th of July, 1870, a rate which was made in June, 1869, although he had since the commencement of the qualifying year been excused from the payment of that rate under the 11th section of 54 Geo. 3, c. 170. That question divides itself into two, viz. 1. Was he bound, in order to acquire the qualification, to pay a rate made before the commencement of the qualifying year? 2. If he was, did the fact of his being excused from payment do away with the disability? As to the first question, I answer that he was bound to pay *all* rates that had become payable by him in respect of the qualifying premises; and I say so on the ground of the marked difference of the language of subs. 4 from that used in the other subsections of s. 3 of the Representation of the People Act, 1867. If one were at liberty to bring into account what one knows upon the subject, I might say that I know that every word of that section was painfully discussed in Parliament: and we must assume that the difference of language was not accidental. The construction we are now putting upon subs. 4 is considerably strengthened when we look at s. 28, the language of which is equally general. The notice required by that section to be given would embrace *all* rates in arrear. And s. 29 would seem to require the same construction. And I think this construction is further strengthened by a reference to s. 35 of 6 Vict. c. 18, which empowers the revising barrister to call before him the overseers of the past year, and to compel the production of the rate-books of such past year, and to ss. 28 and 29 of 31 & 32 Vict. c. 58, which contain a similar provision with respect to the 12*l.* occupation franchise for counties. These sections seem to me fully to justify the construction we put upon the enactment

now in question. The whole spirit of the legislation on the subject shews that the claimant was bound to pay all the rates which had become payable by him in respect of the premises occupied by him, and that the non-payment operated a disqualification. Then comes the question, whether his excusal from payment of the June rate after the commencement of the qualifying period gets rid of the disability. I understood the contention of Mr. Wills to be that it did not matter for this purpose whether the excusal by the justices under 54 Geo. 3, c. 170, was before or after the 31st of July; and that, if the effect of the excusal was not to relieve the claimant from disability, he would be for ever excluded from acquiring the franchise. If such were the result, it would not induce me to construe subs. 4 of s. 3 of the Representation of the People Act, 1867, differently. It may be that an excusal before the commencement of the qualifying year would take the case out of that provision; or it may be that the claimant might, notwithstanding he was once excused, regain his position by tendering the rate. Upon this, however, I give no opinion. But I incline to think that Mr. Wills's construction of 54 Geo. 3, c. 170, s. 11, is too rigid. If any difficulty exists, that is no reason for departing from the plain language of the statute. It might be suggested that there would be absurdity in holding a man to be qualified who had been excused from payment of rates for a long series of years, because he had paid a small amount assessed upon him during the qualifying year. I therefore come to the conclusion that the decision of the revising barrister was right, and must be affirmed.

Decision affirmed.

Attorneys for appellant: *Taylor, Hoare, & Taylor.*

[END OF REGISTRATION CASES.]

1871
May 12.

METROPOLITAN RAILWAY COMPANY (PLAINTIFFS IN ERROR) *v.* EDWARD AND HARRIET WILSON (DEFENDANTS IN ERROR).

Error in Fact—Assignment of Facts for Error which might have been pleaded—Husband and Wife.

A judgment having been recovered by plaintiffs, suing as husband and wife, the defendants afterwards brought error in fact, assigning as error that, before the pretended marriage of the plaintiffs, the female plaintiff had intermarried with another man, who still remained alive:—

Held, that such assignment of error was bad, inasmuch as the facts composing it might have been pleaded, and the defendants were therefore not entitled to take advantage of them by way of error.

ERROR in fact upon a judgment in an action brought by the defendants in error against the plaintiffs in error.

Declaration in the action stated that Edward Wilson and Harriet his wife sued the Metropolitan Railway Company, for that the defendants were carriers of passengers upon a railway from Baker Street, in the county of Middlesex, to Moorgate Street, in the city of London, for reward to the defendants, and the plaintiff Harriet became and was received by the defendants as a passenger, to be by them safely and securely carried in a certain train and carriage upon the said railway on a journey from Baker Street aforesaid to Moorgate Street for reward to the defendants. Yet the defendants did not safely and securely carry the plaintiff Harriet upon the said journey, and so negligently and unskilfully conducted themselves in the management of the said railway train and carriage, and the entrance of the said plaintiff Harriet into the said train and carriage, and carrying her therein upon the said journey, that she was wounded and injured, and permanently disabled, and suffered great pain for a long time.

Second count stated that the plaintiff Edward sued the defendants for committing the wrongs in the first count stated, as therein alleged, whereby he lost the comfort and services of the said Harriet for a long time, and would be permanently deprived thereof, and incurred expenses for nursing her and for medical attendance.

Pleas: 1. Not guilty. 2. That the plaintiff Harriet did not

become, nor was she a passenger on the said railway on the terms alleged. Issues.

At the trial the verdict was found for the plaintiffs for 200*l.*, and judgment was signed accordingly. The defendants afterwards brought error in fact, and assigned for error that, before the commencement of the said suit of the said Edward Wilson and Harriet in the said suit called and impleaded as Harriet his wife against the said Metropolitan Railway Company by the said Edward Wilson and Harriet, and before the alleged and pretended marriage of the said Edward with the said Harriet, she, the said Harriet, intermarried with and took to husband one Thomas Keeble; that the said Thomas Keeble, at the time of the said alleged and pretended marriage of the said Edward and of the said Harriet, and also at the time of the commencement of the said suit, and also at the time of the giving the judgment aforesaid, was and yet is alive and the lawful husband of the said Harriet, and that the said Harriet was not, at the time of the happening of the wrongs in the declaration mentioned, nor at the commencement of the said suit, nor at the time of the giving judgment aforesaid, nor is she now, covert of the said Edward Wilson.

Plea to assignment of error, that there was no error in the record and proceedings, or in the giving of judgment aforesaid. Joinder of issue.

Montagu Chambers, Q.C. (*Philbrick* with him), for the plaintiffs in error. The law with relation to assignments of error in fact is treated of in Stephen on Pleading, 7th ed. p. 117, and it is there stated as follows: "But there are certain facts which affect the validity and regularity of the legal proceeding itself; such as the defendant's having, while under age, appeared in the suit by attorney, and not by guardian; or the plaintiff's or defendant's having been a married woman when the suit was commenced. Such facts as these, however late discovered and alleged, are errors in fact, and sufficient to reverse the judgment upon error brought." In this case there is a fact which affects the validity of the proceeding, and is now brought to the knowledge of the Court. In *Castledine* v. *Mundy* (1), Parke, B., says: "The general rule is,

(1) 4 B. & Ad. at p. 95.

1871

METROPOLITAN RAILWAY CO. v. WILSON.

that the court, ex officio, must give the proper judgment according to the right appearing on the whole record; and he cites a case referred to in *Dive* v. *Manningham* (1) as an authority to that effect. See also *Marshall* v. *Jackson*. (2) So here it now appears to the Court on the whole record that one of the plaintiffs has no title, and is a complete stranger to the cause of action.

[WILLES, J. The facts the defendants now seek to take advantage of might have been made the subject of a plea. Why should facts such as these be assigned for errors any more than in an action of debt payment, or a release?]

The distinction is drawn in the passage already referred to in Stephen on Pleading, between such facts as payments or a release, and facts which go to the validity and regularity of the whole proceeding; and it is said that these latter, however late discovered, are sufficient to reverse the judgment. Here the action is brought by persons as husband and wife who are not so, and consequently who are not entitled to bring this action at all. Another person is entitled to bring the action, viz., the real husband. He might in such a case come forward, and in conjunction with his wife, or by himself in respect of his own damage, if any, bring a fresh action against the plaintiffs in error.

He also cited *Milner* v. *Milnes* (3), *Le Bret* v. *Papillon* (4); *Bidgood* v. *Way* (5), *Philliskirk* v. *Pluckwell* (6), and *Irwin* v. *Grey*. (7)

Prentice, Q.C. (*W. G. Harrison* with him), for the defendants in error, was not called upon.

WILLES, J. We are all of opinion that the judgment must be for the defendants in error. The action was brought against the plaintiffs in error by the defendants in error, as man and wife, for damages in respect of injuries sustained by the female plaintiff when a passenger on the company's line, and also for whatever accessorial damage was sustained by the alleged husband by reason

(1) Plowd. at p. 66.
(2) 4 E. & B. 669, n.; 24 L. J. (Q. B.) 166, n.
(3) 3 T. R. 627.
(4) 4 East, 502.
(5) 2 W. Bl. 1236.
(6) 2 M. & S. 393.
(7) 19 C. B. (N.S.) 585; 34 L. J. (C.P.) 313; S. C. in Ex. Ch. Law Rep. 1 C. P. 171; in H. L. Law Rep. 2 H. L. 20.

of the injury to his wife. A verdict passed in that action for the plaintiffs for 200*l.*, and the plaintiffs in error allege as error the bare fact, without more, that before the pretended marriage of the plaintiffs Edward and Harriet, the plaintiff Harriet had married Keeble, and that he remained alive, and call on us to reverse the judgment on that ground. No fraud is shewn on the part of the plaintiffs, and it is quite consistent with the assignment of error that Keeble may have deserted his wife, and remained away for seven years, and the wife may have thought that he was really dead, and that Wilson and she were truly man and wife. It is also consistent with the assignment of error that the defendants may have known the facts, and chosen to allow the action to proceed to trial, and not to raise this point until now. It is a general rule of our law, as well as that of other countries, that a defendant must bring forward any facts on which he intends to rely as a defence to the claim made against him in proper and reasonable time, and if he does not, he is precluded from afterwards taking advantage of them. If the defendants were seeking to take advantage of the facts now brought forward by way of motion on affidavits, the Court, in the exercise of its discretion, would clearly apply this rule to the present case. The only cases in which the Court would allow such facts to be brought forward, at a period subsequent to the proper legal time, are cases where there has been fraud on the part of the other side, or where, without any default on the defendant's part, the facts have only subsequently come to his knowledge. I think the same rule applies to this case in the form in which it now comes before us. There is no more ground for allowing the plaintiffs in error to introduce the matter they now seek to set up by way of defence, than there would be for allowing a defendant to introduce the fact of payment, or a release before action, at the present stage of the proceeding. No real injustice can be done by the application of this rule. In all such cases, if there be any danger of the defendants' suffering any substantial prejudice, the court has a discretion to allow the matter to be raised on affidavits by way of motion, and to prevent any abuse of its process. If part of the damages were given in respect of alleged damages sustained by the supposed husband through the injury inflicted on the female plaintiff, to which there

1871

METROPOLITAN RAILWAY CO. v. WILSON.

could be of course no legal claim, the court might interpose and allow the matter to be reopened, unless such damages were given up. With respect to the damages of the wife, it appears clear that the recovery in the present action would operate as an estoppel against her in future. The case of *Coan* v. *Bowles* (1) is similar in principle to the present. If a married woman sue and recover as a feme sole, no question being raised as to her coverture, the judgment of Lord Holt in that case is authority to shew that her coverture cannot be assigned for error. It is in effect contended by the plaintiffs in error, that in such a case the woman, after recovering as a feme sole, could join with her husband and compel the defendant to pay again. Lord Holt says: "Suppose a feme covert bring an action as a feme sole against a man, and the defendant pleads in bar, he shall never assign this for error: if she make an attorney, this will not be assigned for error." This accords with the law generally laid down in the books on this subject, as for instance, Tidd's Forms, 8th ed. p. 544, where the precedents of assignments of error in fact of this description are not by parties to the record who have had an opportunity of pleading the facts. The case of an infant defendant is exceptional, because the law in that case recognizes a necessity for an especial protection. In the case of a feme covert defendant, her husband and herself may jointly assign her coverture for error, and the reason is obvious; the husband not having been a party to the record, and so not having had an opportunity of pleading the coverture, might, unless it could be taken advantage of by way of error, be deprived of his wife's society by her being taken in execution. It seems clear, therefore, that in the case of a married woman suing as a feme sole, the defendant, if he do not plead the coverture, is bound by the judgment, and cannot afterwards set it up as a defence. That seems to involve as a necessary consequence that the plaintiff should also be estopped. Similar considerations apply to the present case. The female plaintiff has brought an action here as the wife of Wilson, under circumstances in which she was ultimately entitled to recover in that action in respect of the injuries complained of, and the defendant will have paid the amount of the judgment in satisfaction of a legal obligation to do

(1) 1 Show. 165.

so. Under these circumstances it appears to me that such payment is a binding one, and consequently that the female plaintiff, so far as she is concerned, will be estopped from any further claim. But then, with respect to the real husband's supposed rights, a difficulty was raised. It was said that he would be entitled to bring error and reverse the judgment, as affecting his rights by estopping his wife. I find no precedent for a writ of error by a husband to reverse a judgment in favour of his wife; and with respect to any claim which he might make in his own right by reason of the injury to his wife, and for which he might have an action, even if the damages under the circumstances could be more than nominal, any possible difficulty might be obviated by an application to the Court by the defendants by way of motion. The Court might stay execution until some security had been given by the plaintiffs against any such claim. It was pointed out in the judgment in *Irwin* v. *Grey* (1) that it was better not to extend the number of cases in which matters might be assigned as errors in fact, but to leave such matters as much as possible to be dealt with by the Court in the exercise of its summary jurisdiction, to prevent abuse of its process, inasmuch as by the former mode of proceeding the Court is bound by a rigid rule of law to reverse the judgment if there be error, even although it may be doing injustice by so doing.

On reference to the books of practice, it will be found that there is distinct authority for the decision at which we have arrived. In Chitty's Archbold, 12th ed. vol. i. p. 573, it is said that the plaintiff in error "shall not assign that for error which he might have pleaded in abatement or in bar of the action, as a release or the like, or which was cured by the appearance of the party below;" and in 2 Wms. Saunders, 101 w, 101 x. 6th ed., the authorities are collected, and it is laid down as a general rule that nothing can be assigned for error that contradicts the record, or that is aided by appearance, or that is not taken advantage of in due time; and *Coan* v. *Bowles* (2) is cited as an authority for the proposition that a man shall not assign as error that which he might have pleaded in abatement. It is clear that the facts in this case might have been

11 Jur. N.S. 60. 12 Jur. N.S. 17.

(1) 19 C. B. (N.S.) 585; 34 L. J. (C.P.) 313; S. C. in Ex. Ch. Law Rep. 1 C. P. 171; in H. L. Law Rep. 2 H. L. 20.

(2) 1 Show. 165.

1871

METROPOLITAN RAILWAY CO. v. WILSON.

made the subject of a good plea in bar, for they would, when so pleaded, have shewn that one of the parties to the action had no cause of action.

MONTAGUE SMITH, J. I am of the same opinion. I think that the plaintiffs in error, the defendants in the action, are not entitled to assign these facts as error in fact, because they might have pleaded them to the action. The general rule of law is clear that no matters which could have been set up by plea in bar or abatement can be set up after judgment by way of error. In the report of the case of *Coan* v. *Bowles* (1), in Carthew, p. 124, the following passage occurs in the report of Lord Holt's judgment: "And he laid down this to be a general rule, viz., that a man shall never assign that for error which he might plead in abatement, for it shall be accounted his folly to neglect the time of taking that exception." The case of *Hayward* v. *Williams* (2) is a strong authority in favour of the rule. There it was decided, after considerable discussion, that the husband, where the judgment is against the wife sued as feme sole, may have a writ of error to reverse the judgment. The report states that the wife was sued as a feme sole. She pleaded, and judgment was given against her, and the husband and wife joined in a writ of error. The report proceeds: "The question was, whether the Baron, who was a stranger to the record, might join in a writ to reverse the judgment. It was moved divers times, and the Court advised, and at last they said that a stranger to the record may not have a writ of error to reverse it, but that is only where he may have another remedy to avoid the prejudice he may receive by it, but in this case the Baron hath no other remedy, for his wife is taken in execution, and by this means he shall lose her society. And, therefore, reversetur," &c. The reason given for the husband's being entitled to his writ of error, namely, that he has no other remedy, is strong to shew that the defendants, who had an opportunity of pleading the facts, are not so entitled. The passage that has been cited from Stephen on Pleading does not appear to me to support the argument of the plaintiffs in error in the present case, because this is not, I think, the case of what is meant there by an invalidity

(1) 1 Show. 165. (2) Sty. 254, 280.

or irregularity in the proceeding itself. The facts here affect the rights of the parties suing to maintain the action, and might have been set up by way of plea, and so this case does not come within the proposition laid down.

BRETT, J. It has been argued that the Court is bound ex officio to reverse this judgment on having its attention called to facts which shew that the plaintiffs in the action had no title to maintain it. But before the Court can be bound to take notice of the facts, they must be brought before it by a party entitled to bring them forward, and under circumstances in which such party is so entitled. It seems to me that the authorities shew that the defendant is not entitled to allege a fact as error which might have been brought forward by plea in abatement or bar; and that they also shew that the defendants had a right to plead these facts either in abatement or in bar. They are, therefore, not such persons as are entitled to bring these facts before the Court, and the Court cannot therefore be bound to take judicial cognizance of such facts, and the doctrine which has been relied upon does not apply.

Judgment for the defendants in error.

Attorneys for plaintiffs in error: *Burchells.*

Attorneys for defendants in error: *Nickinson, Prall, & Nickinson.*

1871
Jan. 24.

THE QUEEN *v.* CHAMPNEYS, Clerk. (1)

*Ecclesiastical Law—Preferment annexed to a Deanery—Construction of Statute—General Words—*4 & 5 *Anne, c. xxxii.*—3 & 4 *Vict. c.* 113, *s.* 50—13 & 14 *Vict. c.* 94, *s.* 19.

By a private Act of 4 & 5 Anne, intituled "An Act for augmenting the number of canons residentiary in the cathedral church of Lichfield, and for improving the deanery and prebends of the said cathedral," reciting, amongst other things, "that Her Majesty, in consideration of the small income that arose to the dean out of the revenue of the said church, and the great charge he must necessarily undergo in the decent attendance upon his place and office, had been graciously pleased to permit that the rectory of Tatenhill, the perpetual advowson whereof Her Majesty was seised of in right of the Duchy of Lancaster, should be annexed to the said deanery," it was enacted "that the said rectory and church of Tatenhill should be united and annexed to the deanery of Lichfield for ever, and the dean of Lichfield then in being, upon application made to the bishop of Lichfield, should receive institution to the same without presentation, and continue possessed thereof in right of his deanery, so long as he should remain dean of Lichfield, and no longer; it being the intent of that Act that the dean of Lichfield and his successors for ever should always be rectors and incumbents of that church, on making such allowance to a curate or curates as the bishop should appoint," &c.

By s. 50 of 3 & 4 Vict. c. 113, intituled "An Act to carry into effect, with certain modifications, the Fourth Report of the commissioners of ecclesiastical duties and revenues," it is enacted that, "subject to the provisions herein contained, all the estate and interest which the holder of any deanery or canonry not suspended by or under the provisions of this Act, and his successors, have and would have in any lands, tithes, and other hereditaments or endowments whatsoever annexed or belonging to or usually held or enjoyed with such deanery or canonry (except any right of patronage), or whereof the rents and profits have been usually taken and enjoyed by the holder of such deanery or canonry as such holder separately and in addition to his share of the corporate revenues of such chapter, shall, without any conveyance or assurance in the law other than the provisions of this Act, accrue to and be vested absolutely in the ecclesiastical commissioners for England, and their successors, for the purposes of this Act:"—

Held, that the general provision in s. 50 of the 3 & 4 Vict. c. 113, did not repeal the particular provision in the 4 & 5 Anne, c. xxxii. for annexing the rectory of Tatenhill to the deanery of Lichfield, so as to re-vest the patronage of the rectory in the Crown, and vest the emoluments thereof in the ecclesiastical commissioners for the purposes of the Act.

The 13 & 14 Vict. c. 94, s. 19, enacts that "no spiritual person appointed to the deanery of any cathedral or collegiate church shall accept to take and hold therewith any benefice not situate within the city or town of the cathedral or collegiate church in which he shall hold such deanery:"—

Held, that the Dean of Lichfield did not accept the rectory of Tatenhill to hold

(1) Decided in Hilary Term.

the same with the deanery, within the meaning of that statute; but that, on his appointment to the deanery, he became rector of Tatenhill by force of the statute of Anne.

SPECIAL case stated for the opinion of the Court upon a writ in the nature of a quare impedit issued at the instance of the Attorney-General on behalf of Her Majesty:—

1. By a private Act of 4 & 5 Anne, c. xxxii., intituled "An Act for augmenting the number of canons residentiary in the Cathedral Church of Lichfield, and for improving the deanery and prebends of the said cathedral," reciting, inter alia, that Her Majesty, in consideration of the small income that arose to the dean out of the revenue of the said church, and the great charge he must necessarily undergo in the decent attendance upon his place and office, had been graciously pleased to permit that the rectory of Tatenhill (the perpetual advowson whereof Her Majesty was seised of in right of the Duchy of Lancaster) should be annexed to the said deanery, it was by s. 2 enacted "that the said rectory and church of Tatenhill, whenever it shall by any lawful means first become void, shall be united and annexed to the said deanery of the church of Lichfield for ever, and the dean of Lichfield then in being, upon application made to the bishop of the diocese of Lichfield and Coventry, shall receive institution to the same without presentation, and continue possessed thereof in right of his deanery so long as he shall remain dean of Lichfield and no longer, it being the intent of this Act that the dean of Lichfield and his successors for ever should always be rectors and incumbents of that church, on making such allowance to a curate or curates as the bishop for the time being shall appoint, the said dean for the time being nevertheless paying the first fruits at his instalment into the said deanery, and tenths yearly, and all other dues after the same manner as all former incumbents or persons instituted into the said rectory have hitherto done."

2. By 3 & 4 Vict. c. 113, intituled "An Act to carry into effect, with certain modifications, the Fourth Report of the commissioners of ecclesiastical duties and revenues," it is (s. 50) enacted as follows: "Subject to the provisions herein contained, all the estate and interest which the holder of any deanery or canonry not suspended by or under the provisions of this Act, and his

1871

THE QUEEN v. CHAMPNEYS.

successors, have and would have in any lands, tithes, and other hereditaments or indowments whatsoever annexed or belonging to or usually held or enjoyed with such deanery or canonry (except any right of patronage), or whereof the rents and profits have been usually taken and enjoyed by the holder of such deanery or canonry, as such holder, separately and in addition to his share of the corporate revenues of such chapter, shall without any conveyance or assurance in the law other than the provisions of this Act, accrue to and be vested absolutely in the ecclesiastical commissioners for England and their successors, for the purposes of this Act."

3. By 13 & 14 Vict. c. 94, intituled "An Act to amend the Acts relating to the ecclesiastical commissioners," it was (s. 19) enacted "that no spiritual person appointed to the deanery of any cathedral or collegiate church, after the 10th of April, 1850, shall accept, to take and hold therewith, any benefice not situate within the city or town of the cathedral or collegiate church in which he shall hold such deanery; and, where any spiritual person so appointed, after the said 10th of April, holds at the time of his admission to such deanery any benefice not situate within such city or town, such benefice, unless sooner avoided, shall become void on the expiration of six calendar months from the time of his admission to such deanery: Provided always, that the income of any benefice which may be holden with any such deanery shall in no case exceed the amount or sum of 500*l.* per annum."

4. On the 28th of November, 1868, the defendant was by letters-patent of that date under the Great Seal duly appointed by Her Majesty dean of the cathedral church of Lichfield.

5. The defendant accepted such appointment, and was on the 15th of December, 1868, duly installed and inducted into the said deanery, with all its rights, members, and appurtenances.

6. The defendant, upon his said installation, entered into the real actual and corporeal possession of the said rectory of Tatenhill, and claims to hold and retain the same in right of his said deanery, under the provisions of the 4 & 5 Anne, c. xxxii., and has since his appointment to the said deanery always been and is willing to make such allowance to a curate or curates of the said rectory as the bishop for the time being shall appoint, and to make

all other payments and perform all such acts as are directed in and by the said statute.

7. The rectory of Tatenhill is not situate within the city of the said cathedral church of Lichfield, in which the defendant holds the said deanery.

8. Since the 4 & 5 Anne, c. xxxii., the dean of Lichfield for the time being has always held the rectory of Tatenhill, and received the tithes and emoluments of that benefice; but no institution of any dean to the rectory has ever in fact been made; and his title has been solely that derived from his appointment as dean, and his induction and installation as such.

The questions for the opinion of the Court were, 1. whether the rectory of Tatenhill is united or annexed to the deanery of Lichfield so that the defendant as dean of Lichfield can lawfully hold and retain the same: If the rectory cannot be so held, then, 2, whether Her Majesty is entitled, in right of the Duchy of Lancaster, to present a new incumbent to the said rectory; or, 3, whether Her Majesty is entitled, in right of the Crown, to present a new incumbent to the said rectory.

Sir J. D. Coleridge, S.G. (with whom were *Sir R. P. Collier, A.G.*, and *Archibald*), for the Crown, contended that, by the operation of 3 & 4 Vict. c. 113, s. 50, all estate and interest in the emoluments and temporalities of the rectory of Tatenhill vested in the ecclesiastical commissioners, subject to the provisions of that Act; that the right of presentation to the rectory thereupon either vested in Her Majesty jure coronæ, or re-vested in her in right of the Duchy of Lancaster; that the provisions of the 4 & 5 Anne, c. xxxii., relating to the rectory of Tatenhill, were repealed by 3 & 4 Vict. c. 113, s. 50, and 13 & 14 Vict. c. 94, s. 19; and that, by entering into possession of the rectory of Tatenhill, the defendant, within the meaning of the 13 & 14 Vict. c. 94, s. 19, illegally accepted to take and hold the benefice contrary to the provisions of that section. He referred to several passages in the 2nd and 4th reports of the ecclesiastical commissioners, and commented upon the various sections of the principal statute bearing upon the case, and cited *Savil* v. *Savil.* (1)

(1) Fort. 351.

1871

THE QUEEN v. CHAMPNEYS.

Sir John Karslake, Q.C. (*Philbrick* with him), for the defendant, insisted that the defendant, as dean of Lichfield, was entitled to hold and retain the rectory of Tatenhill; for that, upon the true construction of 4 & 5 Anne, c. xxxii., the rectory was annexed and united to the deanery in such manner that the dean, by the letters-patent, installation, and induction to the deanery, ipso facto became rector of Tatenhill; that 3 & 4 Vict. c. 113 did not repeal the 4 & 5 Anne, c. xxxii.; that 13 & 14 Vict. c. 94, s. 19, did not affect the case of the rectory of Tatenhill thus annexed by statute to the deanery of Lichfield, the dean never having accepted to take and hold therewith a benefice within the meaning of that enactment; that the ecclesiastical commissioners could not, for the purposes of the Act of 3 & 4 Vict. c. 113, hold or have vested in them a rectory with cure of souls; and that, where it was intended by the legislature to make provisions for cases like the present, it was done in express terms, as in 3 & 4 Vict. c. 113, ss. 43, 63. He also commented upon the reports of the commissioners and the various provisions of 3 & 4 Vict. c. 113, and cited *Reg.* v. *Dean of Hereford.* (1)

BOVILL, C.J. By the 4 & 5 Anne, c. xxxii., the rectory and parish church of Tatenhill, the perpetual advowson whereof Her Majesty was seised of in right of the Duchy of Lancaster, was united and annexed to the deanery of Lichfield, and the then dean and his successors, so long as they should respectively remain such deans, became without presentation rectors of Tatenhill, and entitled as such rectors, and in right (as it seems to me) of the rectory, to the parish church, with all tithes, glebes, and other profits appurtenant thereto. If that statute remains in force and unaffected by any subsequent legislation, the defendant, the present dean of Lichfield, having been duly appointed to the deanery, is now legally rector of Tatenhill, and as such rector entitled to the endowments belonging to the rectory. But it is contended by the Solicitor-General, on behalf of the Crown, that 3 & 4 Vict. c. 113, and especially s. 50 of that statute, has repealed the statute of Anne, or has at any rate interfered with its operation so far as the rectory of Tatenhill is concerned, and that the effect of this subsequent

(1) Law Rep. 5 Q. B. 196.

Act has been to vest something (what, I will consider hereafter,) in the ecclesiastical commissioners, and to revest the patronage of the rectory in the Crown. The statute, 3 & 4 Vict. c. 113, was no doubt passed to carry into effect, with certain modifications and alterations, the fourth report of the ecclesiastical commissioners, which report is recited in the preamble to the Act, and therefore has been properly brought before us. It will be necessary to refer to several of the provisions of the Act. The fourth report dealt principally with cathedral and collegiate churches and the officers or ministers connected therewith; and the cathedral church of Lichfield, the dean and chapter, and its various officers are particularly referred to both in the report and in the Act. The Act does not profess to carry out the whole of the scheme of the commissioners. The title and the preamble both refer to "certain modifications" and "certain alterations." In order, therefore, to ascertain how far the legislature intended to give effect to the recommendations of the commissioners, we must be guided by the language of the Act itself, though, no doubt, some light is thrown upon it by that of the report. By s. 13 of 3 & 4 Vict. c. 113, two of the canonries of Lichfield were suspended; and by the same section it appears that one of these had been annexed to the rectory of the church of St. Philip in Birmingham. We have had our attention called to the statute under which this canonry or prebend and the rectory of St. Philip Birmingham were united, viz. the 7 Anne, c. 34, from which it appears that the prebend referred to was that of Sawley. By s. 13 of 3 & 4 Vict. c. 113, the prebend of Sawley and the rectory of St. Philip Birmingham are detached from one another by express words. The language of the section is, that, "in the chapter of the said church of Lichfield the first vacant canonry shall be suspended, and the canonry annexed to the rectory of the church of St. Philip in Birmingham shall, immediately upon the first vacancy thereof, be detached from the said rectory, and be also suspended." If the rectory had been detached simply, I should have expected to find some provision made for the cure of souls, not only as to the person appointed to that duty, but also as to the fund to furnish his remuneration; but, as to the rectory of St. Philip Birmingham and this prebend of Sawley, the emolument ceases; the prebend is

1871

THE QUEEN v. CHAMPNEYS.

to be suspended. The rectory, however, would remain with all its incidents. There is a further provision as to that rectory by s. 63 of the Act, which enacts that "out of the indowments belonging to the suspended prebends in the cathedral church of Lichfield, after setting apart so much of the rents and profits of the prebend of Sawley as hath been heretofore applied as an addition to the fabric fund of the said cathedral church, such provision as shall be deemed fit shall by the like authority be made for the rector of the church of St. Philip," &c. By the latter part of s. 49 it is provided that "the profits and emoluments arising from corporate revenues belonging to the canonries suspended in the chapters of the cathedral churches of Chester, Lichfield, and Ripon, respectively, shall become, as the vacancies occur, part of the divisible corporate revenues of the said chapters respectively;" and by s. 63, as I have before observed, provision was to be made out of the suspended canonry of Lichfield for the rector of St. Peter Birmingham. By s. 29 also two rectories in Westminster, viz. St. Margaret's and St. John's, are permanently annexed and united to two canonries in the collegiate church of St. Peter there, and the respective incumbents, as canons of the said church, became "ipso facto rectors of the said respective parishes and the parish churches thereof to all intents and purposes." There is also an important provision in the Act, to which our attention was called by Sir John Karslake, as to the rectory of Haseley, which was annexed to the deanery of the free chapel of St. George, Windsor, by the statute of 7 Anne, c. xxxi. So much of that Act as related to the rectory, parsonage, and parish of Haseley was repealed by s. 43 of 3 & 4 Vict. c. 113, and the rectory was detached and dissevered from the deanery, and the patronage thereof vested in the chapter. We have, therefore, two instances as to rectories attached to prebends; and in each case we find an express enactment for their severance. It may be useful here to refer to 13 & 14 Vict. c. 94, for the purpose of shewing that where a rectory was attached to any dignity in a cathedral church, and it was intended to sever them, it is always done by express enactment; for, though what is found in an Act of 1850 may not be a certain guide as to the meaning of an Act passed ten years before, still the enactment I refer to (s. 22) shews what the legislature then thought right

and necessary to be done when a rectory was intended to be severed from a dignity. There is there, as in the cases of Haseley and Sawley, an express enactment as to the severance and as to what is to happen upon that severance. There is also in 3 & 4 Vict. c. 113, an enactment with respect to sinecure rectories. Sect. 48 enacts that all such rectories shall be suppressed, with a proviso to meet the case of private rights of patronage. Then s. 54 enacts that, "upon the suppression of any ecclesiastical rectory without cure of souls, all the estate and interest which the rector thereof or his successor has or had, or would have or have had, as such rector, in any lands, tithes, or other hereditaments or indowments whatsoever, shall, without any conveyance thereof, or any assurance in the law other than the provisions of this Act, accrue to and be vested in the ecclesiastical commissioners and their successors, for the purposes of this Act." These sinecure rectories being suppressed, provision is made as to what is to become of the indowments. That section may throw some light upon the words which are relied on in s. 50, "lands, tithes, or other hereditaments whatsoever." They are the lands, &c., annexed or belonging to or usually held or enjoyed with the deanery or canonry. The 50th section undoubtedly vests certain matters belonging to the deans and canons in the ecclesiastical commissioners, but for the purposes of the Act; as to Lichfield, subject to the commissioners being at liberty, by s. 52, to apply them to the augmentation of the corporate revenues of the chapter or to make provision for the deans. The general purposes of the Act appear from other sections. Those purposes are, amongst others, the providing of adequate stipends for the deans and canons (s. 66), and the making of additional provision for the cure of souls in necessitous parishes. The mode in which the purposes of the Act are to be carried out is shewn by s. 83, viz. by schemes to be from time to time prepared by the commissioners and laid before Her Majesty in council. By the subsequent Act of 4 & 5 Vict. c. 39, s. 20, still larger scope is given to the commissioners for carrying out the purposes of the Act.

Now, what is the true interpretation of s. 50 of 3 & 4 Vict. c. 113? for it is on the interpretation to be put upon the language of that section that our decision in the present case must depend.

1871

THE QUEEN v. CHAMPNEYS.

It enacts that, "subject to the provisions herein contained, all the estate and interest which the holder of any deanery or canonry not suspended by or under the provisions of this Act, and his successors, have and would have in any lands, tithes, and other hereditaments or endowments whatsoever annexed or belonging to or usually held or enjoyed with such deanery or canonry (except any right of patronage), or whereof the rents and profits have been usually taken and enjoyed by the holder of such deanery or canonry, as such holder, separately and in addition to his share of the corporate revenues of such chapter, shall, without any conveyance or assurance in the law other than the provisions of this Act, accrue to and be vested absolutely in the ecclesiastical commissioners for England, and their successors, for the purposes of this Act." One of the main purposes of the Act was to enable the commissioners to bring various descriptions of property into a common fund, and then to frame schemes for its appropriation. The whole scope of s. 50 refers to property which may be convertible for the purposes of the Act. The words "lands, tithes, and other hereditaments or indowments," are, as I before observed, the same as the words used in reference to the suppressed rectories, and apply only to what is in the nature of property that is held by deans and canons in their character of deans and canons. The effect sought to be given to the section by the counsel for the Crown is, that it virtually repeals 4 & 5 Anne, c. xxxii., which annexed the rectory of Tatenhill to the deanery of Lichfield; and that it transfers the emoluments of the rectory of Tatenhill to the ecclesiastical commissioners, and entitles the Crown to assume the right of patronage of the rectory shorn of its emoluments. I am unable to concur in this view. In the first place, it seems to me that, if the legislature had intended to repeal 4 & 5 Anne, c. xxxii., we should have found some express enactment to that effect. I think, further, that there would have been an express enactment that the rectory of Tatenhill should be detached from the deanery, and that provision would have been made for the patronage of the rectory. Again, one would have expected to find some provision made for the cure of souls, and for the stipend to be paid to the person to be named the incumbent of the parish, and for the curate. There is an entire absence of any such provisions;

whereas, when dealing with the analogous case of Haseley, and also with another canonry of Lichfield, viz. the prebendary of Sawley, we find that the legislature has made express provisions for all these matters. It is said that we have not before us the whole history of the prebend of Sawley and the canonry annexed to the rectory of St. Philip Birmingham; and to shew that reference is made to ss. 13 and 63 of the Act. I cannot, however, assent to that argument. Both were annexed to the respective rectories by a statute of Anne; and they have remained united ever since. The term "canonry," in s. 13, and the term "prebend" in s. 63 of this Act, seem to me to be used synonymously, and to mean the same thing in each case. The object of the Act, as appears from s. 1, and also from s. 93, was, that all residentiary members of the chapter (except the dean) should henceforth be styled canons. We find, then, that the legislature in the two cases of Haseley and Sawley, make express enactments when it was intended that the former enactments should be repealed; and that there are none as to this canonry of Lichfield. Again, where the legislature has intended to transfer the emoluments of a rectory to the commissioners, there are express enactments to that effect, as in s. 54. It is said that the words of s. 50 are large enough to include a rectory in its widest sense,—not only the emoluments, but also the right to the church, churchyard, glebe, tithes, and everything that is appurtenant to the rectory. That seems to me to be a much larger construction than the words of s. 50 will warrant. I am not aware that the commissioners have vested in them any rectories in so wide a sense: and no instance has been produced. It seems to me to be wholly unnecessary and foreign to the duties of the commissioners that such should be the case. If the "rectory" in its widest sense is to be considered as passing to the commissioners, the patronage also must go to them. It is true that the right of patronage is excepted; but that means the rights of patronage heretofore exercised and enjoyed by the deans and canons. It seems to me, however, that these words in s. 50 have a totally different meaning. They refer to "lands, tithes, and other hereditaments and indowments" which belonged to the deanery or canonry, and were enjoyed by the holder of such deanery or canonry as such dean or canon; whereas,

1871

THE QUEEN v. CHAMPNEYS.

the emoluments which it is here contended passed to the commissioners are emoluments which belong to the rectory of Tatenhill, and which are enjoyed by the dean of Lichfield, not as such dean, but as rector of Tatenhill. I therefore come to the conclusion that the legislature did not intend to repeal 4 & 5 Anne, c. 32, or to vest in the commissioners the emoluments of this rectory or the rectory itself in the manner contended for. If they had so intended, one would have expected to find some provision in the Act for the cure of souls in Tatenhill; but, not only is there no provision of that sort, but the commissioners have no power to make any such provision. And, when it is said that, if the contention on the part of the defendant is allowed to prevail, the case of the deanery of Lichfield will be unique, the answer is, that the contention on the part of the Crown would, if successful, render the case of the rectory of Tatenhill unique. For these reasons, I come to the conclusion that 4 & 5 Anne, c. xxxii., is still in force. It may be that the position of this particular rectory was overlooked, or it may be that the legislature did not intend to provide for it. Further provision is made as to Lichfield in 4 & 5 Vict. c. 39; but there is nothing in that Act to transfer the emoluments of this rectory to the ecclesiastical commissioners.

It is a fundamental rule in the construction of statutes, that a subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication. We had occasion to consider that matter in the recent case of *Thorpe* v. *Adams*. (1) Upon the whole, therefore, I think that s. 50 of 3 & 4 Vict. c. 113 did not transfer the rectory of Tatenhill to the ecclesiastical commissioners, in the sense contended for by the Solicitor-General; nor did it transfer to them the emoluments of the rectory as enjoyed as rector by the dean of Lichfield. Upon this, the first point, therefore, I am of opinion that the defendant is entitled to the judgment of the Court.

A further point was raised with reference to 13 & 14 Vict. c. 94, s. 19, which enacts that, "no spiritual person appointed to the deanery of any cathedral or collegiate church after the 10th of

(1) Ante, p. 125.

April, 1850, shall accept to take and hold therewith any benefice not situate within the city or town of the cathedral or collegiate church in which he shall hold such deanery;" and then follows a proviso "that the income of any benefice which may be holden with any such deanery shall in no case exceed the amount or sum of 500*l.* per annum." It is said that the defendant in this case did accept the rectory of Tatenhill, to take and hold the same with the deanery of Lichfield. It seems to me, however, that the enactment applies only to the case where the spiritual person, being a dean, has the option of accepting or rejecting some other preferment. If I am right in holding that 4 & 5 Anne, c. xxxii., remains unrepealed, the dean of Lichfield would, immediately on his being appointed to the deanery, become by force of the statute the rector of Tatenhill, not by his acceptance of the rectory, but because the statute had annexed it to the deanery. I am therefore of opinion that 13 & 14 Vict. c. 94, s. 19, has no application, and that the case on the part of the Crown altogether fails, and the defendant is entitled to judgment.

WILLES, J. I am of the same opinion. The question turns upon the construction to be put upon s. 50 of 3 & 4 Vict. c. 113, reading it by the light of other provisions of the Act. Although, doubtless, the language of that section is wide enough to include such property as is claimed in this case to belong to the commissioners, and in respect of which this proceeding is founded, yet that language must be construed in accordance with the rule that general words in a conveyance are to be restricted to things of the nature and character of those which the instrument shews it to have been the intention of the grantor to pass thereby; and, being so restricted, the words of this section would not include the kind of property which is sought to be diverted from the deanery of Lichfield and vested in the commissioners in this case. I am further of opinion that, assuming the words of s. 50 to be susceptible of a construction which would include the rectory of Tatenhill, the effect would be to vest the rectory, with the right of presentation, in the ecclesiastical commissioners, and not to revest it in the crown. This latter ground would be enough to rest our judgment in favour of the defendant on; but it would leave open the question whether

1871

THE QUEEN v. CHAMPNEYS.

the rectory was not vested in the commissioners, and therefore I shall address myself to the first proposition, viz. that the general words of s. 50, construed by the context, were not intended to include the right of the dean of Lichfield to the rectory in question.

I apprehend that no rule of law is clearer than that general words in a deed which are large enough to include particular property, are not to have that effect simply because standing alone they would do so, but that it is necessary to look at all parts of the instrument to see whether the words are to have not only a general but an universal meaning and effect. I will give an illustration of my meaning by a reference to cases decided upon the construction of wills, and will then examine some of the provisions of the Act itself. Suppose a man makes a will devising all his estates of a particular kind, say his estates in fee-simple, to trustees, with the ordinary directions to pay debts and legacies. No words could be more general; they are large enough to pass all the estates in fee-simple that the testator has; yet nothing is more clear and obvious than this, that, if the testator died possessed of fee-simple estates in which he was beneficially interested, and also of others which were held by him in trust, the former only would pass by the devise, and not the latter. It can hardly be necessary to refer to authority for that; if it were, I would cite *Roe* d. *Reade* v. *Reade*. (1) For the same reason, viz. that the proceeds of the estate could not properly be applied by the trustees to the purposes of the trust, if the testator happened to have a third fee-simple as mortgagee, the general words, though large enough of themselves, would not convey that estate: see *Doe* d. *Roylance* v. *Lightfoot*. (2) If that be so with respect to temporal property, by reason of the rule that general words in a deed or will are to be restricted to such property as the grantor or testator could properly have intended to be embraced by them, à fortiori must the rule apply to church property, which is not only stamped with a trust of a temporal character, but is also consecrated to pious uses by a trust more sacred,—a trust the interference with which by the legislature cannot be presumed to have been intended from the use of ambiguous words; though there are, no doubt, instances of

(1) 8 T. R. 118. (2) 8 M. & W. 553.

special provisions for altering the destination of property stamped with a trust of this sacred character. Where, however, the legislature has dealt with property generally, and has not made special provision for the case of property held for religious uses, it has been held that the general words shall not include such property, notwithstanding that it may be in part applicable to the purposes of the Act, lest the whole be diverted from the use stamped upon it, and turned to secular purposes. As an instance of that I would refer to *Parry* v. *Jones*. (1) Every one knows that a creditor may get at the property of a parson, the proceeds of his benefice; but the writ for that purpose does not go to the sheriff. Lay hands must not be laid upon the property of the church. In order to obtain satisfaction of the judgment, it is necessary to address a writ of sequestration to the bishop, who appoints his own officer to collect the emoluments of the living, and to appropriate such portion thereof as may suffice for the cure of souls in the parish, and the ordinary burthens on the benefice, repair of the chancel, &c. Accordingly, when the statutes of insolvency and bankruptcy were first passed, it was found necessary to introduce special provisions to enable the assignees to obtain a sequestration; and, when such provisions were omitted from an Insolvent Act (5 & 6 Vict. c. 116), the effect was held to be, not that the assignees took the proceeds of the benefice, but that, by reason of the trust for the benefit of the church, no part of the proceeds passed to the assignees, but remained in the insolvent. The law was so laid down in *Parry* v. *Jones* (1), and recognized in *Markin* v. *Aldrich*. (2) It is unnecessary to pile up illustrations of the general principle. It is only necessary to look to 3 & 4 Vict. c. 113, to see that the provisions pointing out what is intended to be vested in the ecclesiastical commissioners are wholly inconsistent with this rectory passing under the terms of s. 50. I believe it will be found, upon a careful examination of this Act (which is framed with the greatest possible care and learning, and is unusually explicit in its provisions), that three things are clear; first, that it was not the intention of the legislature to give the commissioners any patronage to be exercised by them; secondly, that it was not

(1) 1 C. B. (N.S.) 339.; 25 L. J. (C.P.) 36.
(2) 11 C. B. (N.S.) 599.

1871

THE QUEEN v. CHAMPNEYS.

intended to confer any benefit on the Crown at the expense of the church, whether in respect of patronage, or otherwise; thirdly, that it was not intended to interfere with any existing or active cure of souls. These propositions seem to me to follow from a consideration of a great many sections of the Act. It will be sufficient to refer to some of them. I would observe at the outset that I take it to be quite clear that the handing over of church property to other than spiritual hands is repugnant to the general principles of the law. In early times impropriations were made exclusively to spiritual persons. Many of these were converted into lay freeholds by grants of the Crown, confirmed by the statute of Hen. 8, at the time of the dissolution of the monasteries. It is certain that before that time the Crown had the impropriation of such property as might be impropriated in favour of religious houses. The Crown was persona mixta, both lay and spiritual; and nobody in those days ventured to dispute the Crown's prerogative in this respect. It may be, in respect of impropriations of that description, that the Crown, being in possession, might transfer its impropriations in the same way as it subsequently transferred the possessions of the dissolved monasteries. It must be repugnant to the mind of any one dealing with this subject to suppose that there can be such a transfer of church property as it is alleged there is by s. 50 of the Act, where there is an active cure of souls, and where either the patronage is put into the hands of a lay corporation, or where, it having got into the hands of a lay corporation, there is no provision for its being used for the benefit of the church. It will be found that the repugnance equally acted upon the minds of the persons under whose auspices this Act was passed, and who must have been most anxious to provide for the cure of souls and the proper support of the incumbent.

The first section that I would refer to is the 22nd, which relates to certain officers of cathedral or other collegiate churches, but does not affect the office of dean. The next is the 28th section, which repeals certain statutes and customs for assigning to the dean or to any canon any lands, &c., in addition to his share of the corporate revenues. A special provision is there made for the abolition of that which it was the intention of the legislature to abolish or repeal; not for the repeal of every statute whereby property is

appropriated to a dean or canon, but only the statutes made by the dean and chapter under customs. Coming on to s. 41, you have a provision made for the patronage of all benefices in which there is an active cure of souls possessed by deans and other individual members of chapters in right of any separate estate held by them as such members; and such patronage is vested in the respective bishops of the dioceses in which the benefices are respectively situate: a proviso follows that with respect to any benefice possessed by any dean in right of any separate estate held by him as such dean, every future dean of the same deanery may, upon a vacancy, present himself, and, with respect to benefices in the patronage of the prebendaries of Southwell, that they are to be vested partly in the Bishop of Ripon and partly in the Bishop of Manchester. The proviso may have been intended to meet such a case, for instance, as where a manor belonging to a deanery, with an advowson annexed to it, becomes vested, under s. 50, in the ecclesiastical commissioners. With respect to the 43rd section, which relates to the rectory of Haseley and the deanery of Windsor, I adopt entirely what my Lord has said, and will pass over it, not because it has not a very great significance in relation to the present question, but because it has already been fully dealt with.

Then we come to the 48th section, which, when taken in connection with the 54th, appears to be quite conclusive of the first of the three propositions which I have laid down. It provides that all ecclesiastical rectories without cure of souls, in the sole patronage of her Majesty, or of any ecclesiastical corporation, when there shall be a vicar endowed or a perpetual curate, shall, upon vacancy, be suppressed, and that, as to rectories without cure of souls, when the patronage belongs to any person other than as aforesaid, the ecclesiastical commissioners for England may purchase such patronage, and upon vacancy such rectories shall be suppressed. All ecclesiastical patronage belonging to the rector of *such* rectory as rector is to be transferred to and vested in the original patron. This appears to me a most significant section in relation to the present question. Here is a section, almost immediately preceding the 50th section, which deals expressly with rectories, and only with rectories of a particular class, for a particular purpose, viz.

1871

THE QUEEN v. CHAMPNEYS.

their extinguishment. Then, on going to the 54th, the inference to be drawn is greatly strengthened. We find there an express provision that the endowments of the suppressed rectories are to be vested in the commissioners for the purposes of the Act. Thus we have a special machinery for dealing with rectories only that have become useless for their original purposes, by which private rights of advowson may be got rid of by purchase, and the rights of patronage attached to such rectories are revested in the original patron. This is accompanied by a special provision as to the destination of the emoluments of such rectories, which is applicable expressly to such property, and so, according to the well-known rule of construction, applicable to it only to the exclusion of other members of the same class. Then, again, we have the 49th section, which immediately precedes the 50th, and which makes provision for the profits of suspended canonries, by which such profits are to be paid to and their estates vested in the ecclesiastical commissioners for the purposes of the Act. It is clear that this section applies only to property forming part of the endowments of the corporate body. With all the concentrated light derived from a consideration of the subject-matter and scope of these previous sections, we have now to look at the language of the 50th section itself upon which this case turns. [His Lordship here read the section.] With respect to the first proposition which I have laid down, viz. that it was not intended to give any right of patronage to the ecclesiastical commissioners, it must be observed that the words of the section expressly except rights of patronage. Was it then intended, when there is such exception, that anything should pass of which such right of patronage formed an essential part, which is an entirety to the existence of which a right of patronage is necessarily incidental? There must be somebody to present. The right of presentation is inseparably connected with a rectory, together with the existence of some benefice for the sustentation of the person to have the cure of souls. The benefice may be disannexed by accident, violence, or statutory enactment; but, on the first creation of a rectory, it would have the essentials of a rectory proper, viz. a cure of souls and a provision for the rector, probably land. These two things are recognized by the statute as constituting a rectory, viz. the provision for the rector, "beneficium," and

the duties pertaining to the office "officium." The rectory is a kind of property distinct both from the land and the cure of souls, but constituted out of both. To this property there must be a right of presentation, and this, by the express words of the section, is not to be transferred to the ecclesiastical commissioners. Is it, then, intended that the Act shall have the extraordinary effect of, if one may use such an expression, plucking the rectory and leaving the feathers to the patron, and handing over the rest to the commissioners? There is no instance of such an interference with property devoted to spiritual uses throughout the Act. Thus, there is not only the argument to be derived from the existence of the previous express provisions as to particular rectories, but the very language of the section itself shews that it was not intended to do that in favour of the ecclesiastical commissioners which would give them a right of patronage, or have the extraordinary effect of destroying property appropriated to an active cure of souls, of which there is no instance throughout the whole series of these Acts intended for the improvement of the Establishment.

With respect to the sections subsequent to the 54th, I do not propose to go through them, but will only make this general remark: If the emoluments of this rectory pass to the ecclesiastical commissioners, I see no mode of dealing with them under the subsequent sections of the Act, except by appropriating them either to the common fund or to the maintenance of the fund for providing for the clergy of the cathedral church, which it seems to me would be a misappropriation of them, having regard to the intention of the legislature as seen in the other parts of the Act, inasmuch as I find no instance except the case of sinecure rectories, where the emoluments are taken from the particular parish for the general purposes of the Act, or to augment the revenues of the cathedral church. It appears to me, therefore, that the three propositions which I laid down may be clearly deduced from a consideration and comparison of the various sections of the Act, viz. first, that it was not intended to give the commissioners any right of patronage; secondly, that it was not intended to confer a benefit on the Crown at the expense of the church; and, thirdly, that it was not intended to interfere with any existing and active

1871

THE QUEEN v. CHAMPNEYS.

cure of souls, so as to take the emoluments intended for the support of the person having such cure of souls in a parish. All these propositions would be contradicted if we were to hold that the general words of s. 50 were not restricted by the context so as not to include this property. With respect to the effect of 13 & 14 Vict. c. 94, I agree entirely with what has been said by my Lord.

MONTAGUE SMITH, J. The argument in favour of the Crown was principally founded upon the 50th section of 3 & 4 Vict. c. 113. Now, the words of that section being general, may no doubt be sufficiently large, if taken alone, to include the rectory; but it appears to me that their generality may be restrained by reference to the other parts of the Act. The section is one which operates as a conveyance to the ecclesiastical commissioners of the property mentioned therein; nothing is dissevered by the Act from the deanery, which is not vested by it in the commissioners. The rectory of Tatenhill, which was annexed by the statute of Anne to the deanery of Lichfield, is an entire rectory, including the freehold of the parochial church and churchyard, and all the customary rights both spiritual and temporal; and by the statute the dean is to be instituted thereto without presentation. Now, I do not find in 3 & 4 Vict. c. 113 any indication of an intention to vest in the ecclesiastical commissioners such property clothed with spiritual duties. My Lord and my Brother Willes have gone very fully through the Act, and shewn by reference to the various sections that a contrary intention is apparent throughout it. If this rectory passed to the commissioners, I should think the freehold in the church and churchyard in which the parish is interested would pass to them, and in fact the whole rectory in its entirety, without any provision for the performance of spiritual duties. It seems to me that such a construction would be opposed to the obvious intention throughout the other sections of the Act. I will only refer to s. 54, which relates to the indowment of suppressed sinecure rectories, and to s. 55. The 54th section enacts that on the suppression of such rectories the endowment shall vest in the ecclesiastical commissioners. The 55th section provides that if in any case it shall appear expedient, on account

of the extent or population or other peculiar circumstances of the parish or district, or from the incompetent endowment of the vicarage or vicarages, or perpetual curacy or curacies, dependent on such rectory, to annex the whole or any part of the endowments belonging to such rectory to such vicarage or vicarages, curacy or curacies, such annexation may be made. It is obviously a most strange hypothesis to suppose that, while the legislature made this provision in the case of sinecure rectories, they intended to vest rectories not sinecures in the ecclesiastical commissioners without making provision for the sustenance of the person to perform the spiritual duties connected therewith. With respect to the later statute, 13 & 14 Vict. c. 94, it was hardly contended by the Solicitor-General that the present case came within it. It seems to me that it does not apply to a case of this kind, but to a case of a dean who voluntarily accepts a benefice under circumstances prohibited by the Act. In this case the defendant became a dean, and without any will of his own, by virtue of the statute of Anne, thereupon became rector of Tatenhill. It was said that this statute was inconsistent with the notion that the legislature intended to leave this rectory annexed to the deanery. It may be that the fact of its remaining so annexed is inconsistent with the general tendency of the legislation on the subject; but there is nothing in my opinion in the terms of the later Act which we can hold to have altered what appears to me the plain and obvious effect of 3 & 4 Vict. c. 113.

BRETT, J. It seems to me that, unless the statute of Anne is repealed, the present dean of Lichfield is of right possessed of and entitled to enjoy the rectory of Tatenhill and all its profits and emoluments. The question therefore is, whether the statute of Anne is repealed either by the statute 3 & 4 Vict. c. 113, or by 13 & 14 Vict. c. 94, or by both.

The statute of Anne is a particular Act, dealing with an individual or particular case. The other Acts are general. The statute of Anne is not expressly repealed by either of the other Acts. The statute of Anne cannot, therefore, be treated as repealed, unless it be so by necessary implication. That, as it seems

1871

THE QUEEN v. CHAMPNEYS.

to me, cannot be, unless upon a fair and true construction of the general Acts, or either of them, there are enactments in them inconsistent with the maintenance of the statute of Anne. In order to shew that a particular Act is repealed by a general Act by implication, it is not enough to shew that it is consistent with the terms used in the general Act that the particular Act may have become useless or futile, that is to say, that the subject-matter of the particular Act comes within the terms of the general Act; it must be shewn, as it seems to me, that there are enactments in the general Act, when rightly construed, inconsistent with the maintenance of the particular Act. Now, in the general Acts there are not, as it seems to me, any such enactments; and upon that ground alone I think the Crown in this case fails to shew that the statute of Anne is repealed.

With regard to the statute 3 & 4 Vict., I think, so far from its appearing that it is inconsistent with the maintenance of the statute of Anne, that it does appear, upon a careful consideration of the statute of Victoria, that the rectory of Tatenhill is not within it. Looking to the report of the commissioners, to the preamble of the Act, and to the 67th, 83rd, and other sections, I accept the view that the only property dealt with by the statute is that which is to be brought into a common fund under s. 67, and which the commissioners must then deal with by scheme under ss. 83 and 84. If that be so, ss. 50, 51, and 52, when they are applicable to property, apply only to such property. The question, therefore, is, whether it appears clearly that the emoluments of this rectory are such emoluments as were intended to go into the common fund to be dealt with by scheme. If they are to go into the fund, the Crown may nominate a spiritual rector to perform the ecclesiastical duties of the rectory of Tatenhill; but the commissioners may, and perhaps must, divert the emoluments to the maintenance of other pastors of other parishes, or to the purposes of the chapter of Lichfield, or other chapters. This seems to me to be a view wholly inconsistent with the idea of treating the rectory of Tatenhill as an ecclesiastical benefice. The cases quoted by my Brother Willes with regard to the bankruptcy and insolvency statutes seem to me to be strong authorities for the

last statement. Further, with regard to the construction of this statute, I can see no real answer to the observation that the case of Windsor,—the only parallel case to that of Tatenhill,—is expressly dealt with. Section 28 is, I think, strongly in favour of the view taken as to s. 50. And I think also that the fact of the sinecure rectories being dealt with by ss. 48 and 54 is a strong corroboration of the propriety, if not necessity, of not applying ss. 50 and 52 to the rectory in question.

As to the statute 13 & 14 Vict. c. 94, I think it applies only to the case of a dean accepting a benefice beyond the bounds mentioned, which, being dean, he might but for the statute accept or decline.

I think, therefore, that our judgment should be for the defendant.

Judgment for the defendant.

Attorneys for the Crown: *Raven & Bradley, for the Solicitor to the Treasury.*

Attorneys for defendant: *Burden & Dunning.*

NEWALL AND ANOTHER *v.* TOMLINSON AND ANOTHER.

April 17.

Principal and Agent—Money paid in Mistake—Settlement in Account.

A. bought cotton of B., both being cotton-brokers at Liverpool, and each acting for an undisclosed principal. Weight-lists of the cotton were in the usual course delivered to each party from the warehouse-keeper at the dock; but by a mistake made by a clerk of B. in adding up the figures, the quantity appeared to be 100 cwt. more than it really was, and A., in ignorance of the mistake, paid B. 509*l.* 15*s.* too much. The mistake was not discovered by either party until several months afterwards. In the meantime, B. had allowed the money so received by him to be settled in account between himself and his principals, to whom he had made advances; and at the close of the transactions between them there was a large balance owing by his principals to B.:—

Held, that A. was entitled to recover back from B. the sum so overpaid to him, the case not falling within the rule by which an agent is relieved from responsibility where he has bonâ fide paid over moneys received by him on account of his principals.

ACTION for money had and received, money paid, interest, and money found due upon accounts stated. Plea, never indebted.

1871

NEWALL v. TOMLINSON.

The particulars of demand were as follows:—

"1870, Dec. 14. To amount of overcharge paid by the plaintiffs to the defendants, being an over-payment on invoice for 289 bales of cotton ex *Glen Cora*, dated April 22nd, 1870, viz.:—

"Error in weight of 74 bales of cotton, said to weigh 37,485 lbs. nett, @ 11½*d.*, per lb.	1796	3	1			
"Discount	26	18	10	1764	4	0
whereas it ought to have been 26,685 lbs. 11½*d.* per lb.	1278	9	8			
"Discount	19	0	8	1259	9	0
				509	15	0
"Interest to 15th of December				15	17	2
				£525	12	2

"The plaintiffs seek to recover the sum of 525*l.* 12*s.* 2*d.* as the difference due to them on the above account, and the like amount on accounts stated.

"The plaintiffs also claim interest on 509*l.* 15*s.* (part of the said sum of 525*l.* 12*s.* 2*d.*) from the 15th day of December, 1870, till payment or judgment."

The cause was tried before Willes, J., at the last assizes at Liverpool. The facts were as follows:—The plaintiffs and the defendants were respectively cotton-brokers in Liverpool. In April, 1870, the plaintiffs bought of the defendants 74 bales of cotton ex *Glen Cora*, each acting for principals whose names were not disclosed, and according to the usage of the cotton-market each treating the others as principals in the transaction. Weight-lists of the cotton were in the ordinary course delivered to each party from the warehouse-keeper at Albert Dock; but a clerk of the defendants made a mistake of 100 cwt. in adding up the figures, and the consequence was that when the plaintiffs paid for the cotton they paid the defendants too much by 509*l.* 15*s.* The mistake was not discovered until the 14th of December, when the plaintiffs demanded back that sum. The invoice for the cotton (which was delivered on the 22nd of April] was headed as follows:—"Messrs. Newall & Clayton, bought from W. D. Tomlinson & Co." &c.; and it was not until after the discovery of the mistake that the plaintiffs were informed (as the fact was) that Messrs. Dixon & Co. were the defendants' principals.

In the meantime the defendants, who had previously to the arrival of the cotton, advanced very considerable sums to the shippers, Messrs. Dixon & Co., had allowed the sum in question in

their account with them, and had subsequently gone on making further advances; and when Dixon & Co. ultimately suspended payment, the balance due from them to the defendants on account of these transactions exceeded 2000*l*. The defendants thereupon claimed to be entitled to shelter themselves under the rule of law which protects payments bonâ fide made by an agent to his principal, without notice; and at the trial it was submitted on their behalf, that, being known to be brokers, and being under advances to their principals, whether the plaintiffs knew that they were acting for principals or not, they (the defendants) were entitled and bound to hand over the money to their principals, or (which was the same thing) entitled to set it off against their advances, and having done so, were not liable to be called upon to refund it: and the cases of *Holland* v. *Russell* (1) and *Shand* v. *Grant* (2), were cited.

The learned judge in his summing-up said that every agent for the sale of goods who has advanced money upon them and has them in his possession, has a right to sell them as owner, unless there be a countermand of his authority; and he distinguished the cases cited, on the ground that in both of them the persons who dealt with the agent knew that they were dealing with one who represented an undisclosed principal; whereas here the defendants, though general brokers, acted in the particular case as principals, and he directed the jury to find for the plaintiffs, damages 509*l*. 15*s*., reserving leave to the defendants to move to enter a verdict for them, or a nonsuit, if the Court should think the ruling wrong.

Quain, Q.C., moved accordingly. The plaintiffs and defendants were both cotton-brokers, and each must necessarily have known that both were acting for principals, though undisclosed; it being customary for brokers making such contracts to send an invoice in their own names. The money, therefore, having been paid under a mistake of fact, and received by the defendants without fraud, and the defendants having, before they had notice of the mistake, paid it over to their principals, or (which is the same thing in point of law) having credited them with it in account, and having gone

(1) 1 B. & S. 424; 30 L. J. (Q.B.) 308: in error, 4 B. & S. 14; 32 L. J. (Q.B.) 297.

(2) 15 C. B. (N.S.) 324.

1871

NEWALL v. TOMLINSON.

on dealing with their principals upon the faith of the account having been properly so credited, it was too late for the plaintiffs to demand the amount back from the defendants, notwithstanding the mistake had originated with them. Upon the principal point, he relied on *Holland* v. *Russell* (1) and *Shand* v. *Grant* (2): and, to shew that the mere means of knowledge of the mistake was not sufficient to charge the defendants, the case of *Kelly* v. *Solari* (3) was cited.

BOVILL, C.J. The defendants in the first instance personally claimed the price of the cotton from the plaintiffs as upon a sale to them by the defendants, each being, as between themselves, personally bound as principals in the transaction, though each were acting for principals whose names were not disclosed. The invoice was made out as upon a sale from the defendants to the plaintiffs, and claiming the price as being due to the defendants personally; and each were liable personally to the others for the due performance of the contract. The defendants were entitled to sue for and recover the price of the cotton in their own names, and to apply it when received to their own use and benefit. They had made large advances to their principals, Messrs. Dixon & Co., upon the security of the cotton, and were entitled to sell it to recoup themselves. In no sense could they be said to have received this money for the purpose of handing it over to Messrs. Dixon & Co.; nor did they in point of fact hand it over to them. It is true that the defendants were shewn to have made further advances to Messrs. Dixon & Co. subsequently to the receipt by them of this money. That, however, could not make it money had and received by Messrs. Dixon & Co. to the use of the plaintiffs, so as to enable them to sue Messrs. Dixon & Co. for it. The mistake originated with the defendants themselves, and they alone are responsible. The cases relied on are clearly distinguishable. In *Shand* v. *Grant* (2), the defendant received the money as agent of the shipowner, and for the purpose of handing it over to him. The case was put entirely upon the ground that the defendant was a mere agent. He had handed over the money to his principal, and the

(1) 1 B. & S. 424; 30 L. J. (Q.B.) 308: in error, 4 B. & S. 14; 32 L. J. (Q.B.) 297.

(2) 15 C. B. (N.S.) 324.

(3) 9 M. & W. 54.

principal was the proper person to sue. So, in *Holland* v. *Russell*, the same view was taken, and the decision proceeded upon the ground that the defendant was a mere agent. Cockburn, C.J., in delivering the judgment of the Court below, after stating what had been the contention on one side and on the other, says (1): "We are of opinion that the plaintiff fails upon the facts. Not only is it clear that the defendant was acting solely as agent, but (the Court having power to draw inferences of fact) we are of opinion that the plaintiff was aware that the defendant was acting as agent for the foreign owners, and as such made to him the payment of the money he now seeks to recover back." And, when the case came before the Court of error, the same view was taken. Erle, C.J., delivering the judgment of that Court, says (2): "The defendant who received this money from the plaintiff received it as agent for a foreign principal. The plaintiff knew that, and paid him in that capacity, with the intention that he should pay it over to that principal, and he did so; and all the money thus received has been accounted for in a settlement of account approved by the foreign principal, under circumstances which clearly amount to payment of that sum to him. The defendant having therefore been altogether an agent in the matter, is there anything which takes him out of the ordinary protection to which an agent is entitled who pays money to his principal before he received notice not to pay it, and before he knew that there was no legal duty on him to do so? There is nothing in this case to deprive the defendant of the right of an ordinary agent so to protect himself." Here the defendants were not mere agents. They were dealing as principals, and entitled to apply the proceeds of the sale of the cotton to their own use. For these reasons I am of opinion that the direction of the learned judge was right, and that there should be no rule.

BYLES, J. I entirely agree with what has fallen from my Lord upon the first point. The defendants did not receive the money as mere agents: they received it for their own use and benefit. In addition, I would observe that the defendants here are seeking

(1) 1 B. & S. 424, at p. 432; 30 L. J. (Q.B.) 308, at p. 312.

(2) 4 B. & S. 14, at p. 15; 32 L. J. (Q.B.) 297, at p. 298.

1871

NEWALL v. TOMLINSON.

to excuse one mistake by another. They paid over (or accounted for) the money to their employers, if not with recollection, yet with notice of the facts. If they were mere agents, they were bound to remember. On both grounds, therefore, I think the verdict was right.

MONTAGUE SMITH, J. I am of the same opinion. Upon the facts appearing, the defendants were not mere agents to receive the money for Dixon & Co., and to hand it over to them. They received it on their own account, and had a right so to receive it and to appropriate it to their own use. They were not mere conduit-pipes: they were in some sense principals, and had a right to appropriate the money in satisfaction of their advances to Dixon & Co., and they did so. What is said by Lord Mansfield in *Buller* v. *Harrison* (1) seems to me to be very much in point: "The law," he says, "is clear, that, if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal: and in the case of *Muilman* v. ———, where it appeared that the money was paid over, the plaintiff was nonsuited. But, on the other hand, shall a man, though innocent, gain by a mistake, or be in a better situation than if the mistake had not happened? Certainly not." If the argument of Mr. Quain were to prevail, the defendants clearly would be in a better position than if the mistake had not happened. They received the money and appropriated it towards satisfaction of their own debt. I think the defendants were not, to use the words of Erle, C.J., in *Holland* v. *Russell* (2), agents altogether. As between themselves and the plaintiffs, they were principals.

BRETT, J. I am of the same opinion. The defendants were originally liable because under a mistake they received money which they were not entitled to. They cannot get rid of that liability, unless they bring themselves within the rule as to an agent who has received money on account of his principal and has paid it over to him. It seems to me that they have failed to bring themselves within that rule. They did not receive this

(1) 2 Cowp. at p. 568. (2) 4 B. & S. at p. 16.

1871

NEWALL v. TOMLINSON.

money for their principals. They stood with regard to the plaintiffs as original contractors. I should be sorry, however, to decide the case on that ground alone. The money in question was received by the defendants, not only as between the plaintiffs and themselves, but also as between Dixon & Co. and themselves, on their own account, and not on account of Dixon & Co. Being under advances, they had a right to sell the cotton and receive the proceeds on their own account. They cannot, therefore, say that they received the 509*l.* 15*s.* in question to the use of their principals; and consequently they do not bring themselves within the rule relied on. I will only add that I found my judgment entirely upon that view, and I do not rely on the ground that the money was received by the defendants through a mistake of their own.

Rule refused.

Attorneys for defendants: *North, Allens, & Carter, for Simpson & North, Liverpool.*

IN RE SARAH JANE SANDILANDS AND OTHERS.

April 17.

Married Woman—Acknowledgment of Deed under 3 *&* 4 *Wm.* 4, *c.* 74—*Sealing.*

A deed was sent out to Melbourne under a special commission for execution and acknowledgment by certain married women. When sent out, the deed had pieces of green ribbon attached to the places where the seals should be, but no wax or other material to receive an impression; and it was returned to this country in the same state, but in all other respects duly executed. The attestation clause stated that the deed was "signed, sealed, and delivered," and two of the commissioners certified that the married women produced the deed before them and "acknowledged the same to be their respective acts and deeds:"—

Held, that there was sufficient primâ facie evidence that the deed was sealed, to warrant the Court in allowing it to be received and filed with the other documents, by the proper officer, under 3 & 4 Wm. 4, c. 74.

A SPECIAL COMMISSION was issued for taking the acknowledgment of a deed at Melbourne, by Sarah Jane, the wife of Benoni Nimmo Sandilands, Mary Elizabeth, the wife of Robert John Amies, Anne Brierly, the wife of Sidney Smith, and Fanny, the wife of Albert Vines, devisees under the will of John Mayer, deceased. The deed when sent out had pieces of green ribbon attached to the places where the seals should be, but no wax; and,

1871

IN RE SANDILANDS.

when returned executed by the several parties, it was in the same condition.

The attestation was in the usual form, "Signed, sealed, and delivered" by the within named parties; one of the attesting witnesses being the Mayor of Melbourne, whose official seal was affixed thereto. The certificate of two of the commissioners also stated that the married women appeared personally before them and produced the indenture before them, "and acknowledged the same to be their respective acts and deeds." In all other respects the documents were complete.

R. G. Williams moved that the indenture, special commission, certificate of acknowledgment, notarial certificate, and declaration be received and filed among the records of this Court by the proper officer for that purpose, pursuant to 3 & 4 Wm. 4, c. 74. The deed in question, attested and certified as it is, must be assumed to have been duly signed, sealed, and delivered. The placing of wax on the instrument is not essential; a wafer, a piece of adhesive paper, or a mark of any description, will suffice.

[BOVILL, C.J. A corporation seal is without wax, or paper, or ink; it is commonly a blank impression.]

Sugden on Powers, 8th ed. 232, upon this subject says: "It is not necessary that an impression should be made with wax or with a wafer. If the seal, stick, or other instrument used be impressed by the party on the plain parchment or paper, with an intent to seal it, it is clearly sufficient; and therefore, where the instrument is a deed, and on proper stamps, and it is stated in the attestation to have been sealed and delivered in the presence of the witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper." "This," adds the learned author, "I am told Lord Eldon decided when in the Common Pleas." So, in Williams on Real Property, 8th ed. p. 144, it is said: "In modern practice the kind of seal made use of is not regarded; and the mere placing of the finger on a seal already made is held to be equivalent to sealing, and the words 'I deliver this as my act and deed,' which are spoken at the same time, are held to be equivalent to delivery, even if the party keep the deed himself."

1871

IN RE SANDILANDS.

BOVILL, C.J. I think there is primâ facie evidence that this deed was sealed at the time of its execution and acknowledgment by the parties. To constitute a sealing, neither wax, nor wafer, nor a piece of paper, nor even an impression, is necessary. Here is something attached to this deed which may have been intended for a seal, but which from its nature is incapable of retaining an impression. Coupled with the attestation and the certificate, I think we are justified in granting the application that the deed and other documents may be received and filed by the proper officer, pursuant to the statute.

BYLES, J. I am of the same opinion. The sealing of a deed need not be by means of a seal; it may be done with the end of a ruler or anything else. Nor is it necessary that wax should be used. The attestation clause says that the deed was signed, sealed, and delivered by the several parties; and the certificate of the two special commissioners says that the deed was produced before them, and that the married women "acknowledged the same to be their respective acts and deeds." I think there was primâ facie evidence that the deed was sealed.

MONTAGUE SMITH, J. Something was done with the intention of sealing the deed in question. I concur in granting this application, on the ground that the attestation is primâ facie evidence that the deed was sealed, and that there is no evidence to the contrary.

Rule granted.

Attorneys for applicants: *Chester & Urquhart, for Wright & Hodgkinson, Stone, Staffordshire.*

1871
Jan. 28.

THE LIVERPOOL UNITED GAS-LIGHT COMPANY, APPELLANTS; THE OVERSEERS OF THE POOR OF EVERTON, AND THE UNION ASSESSMENT COMMITTEE OF THE UNION OF WEST DERBY, RESPONDENTS (1).

Poor-Rate—Union Assessment Act (27 & 28 *Vict. c.* 39)—*Notice of Appeal—Next Practicable Sessions—Prohibition.*

A poor-rate was made for the township of Everton on the 8th of July, 1870. The Liverpool United Gas Co., being dissatisfied therewith, on the 3rd of August applied to the union assessment committee for relief; but the committee declined to grant it. The next sessions for the borough of Liverpool were held on the 1st of September, but no appeal against the rate was then entered. The company, having given the twenty-one days' notice required by the Union Assessment Act (27 & 28 Vict. c. 39), s. 1, moved to enter an appeal against the rate at the sessions held on the 26th of October, contending that the sessions of September were not the next *practicable* sessions after the decision of the assessment committee, inasmuch as it would leave them only six days before the twenty-one days, which was not a sufficient time to enable them to determine whether they would appeal or not. The recorder, yielding to this argument, allowed the appeal to be entered and respited at the October sessions:—

Held, that it was competent to this Court to review the decision of the recorder, upon a motion for a prohibition; and that he was wrong in holding the September sessions not to be the next practicable sessions, and consequently that he had no jurisdiction to entertain the appeal at the October sessions.

RULE calling upon the Recorder of Liverpool and the Liverpool United Gas-Light Company to shew cause why a writ of prohibition should not issue, to prohibit the recorder from trying an appeal by the Liverpool United Gas-Light Company against a poor-rate made for the township of Everton, in the union of West Derby, Lancaster, on the 8th of April, 1870, on the ground that such appeal was not in accordance with the statutes 17 Geo. 2, c. 38, 12 & 13 Vict. c. 45, and 27 & 28 Vict. c. 39, and that therefore the recorder had no jurisdiction to try the appeal.

The rate was made and duly allowed on the 8th of July, 1870. On the 3rd of August the Liverpool Gas Company went before the assessment committee of the union of West Derby to complain of the assessment of their works, but failed to obtain any relief. The next sessions for the borough of Liverpool were held (2) on the

(1) Decided in Hilary Term.

(2) It was stated that at Liverpool there are four quarter sessions, and other four intermediate sessions,—not held by adjournment, but independent sessions,—which are held at uncertain periods fixed at the discretion of the recorder, of which ten days' notice must be given.

1871

LIVERPOOL GAS CO. v. EVERTON.

1st of September, when nothing was done. At the quarter sessions held on the 26th of October, twenty-one days' notice having been given to the assessment committee, an application was made on behalf of the company to enter and respite an appeal against the rate. This was opposed by counsel on behalf of the respondents, on the ground that the application was too late, the next sessions held after the 3rd of August, when the committee refused to alter the rate, being the 1st of September. The recorder, however, held that the period which intervened between the 3rd of August and the 10th, which would be the last day for giving the notice for the September sessions required by 27 & 28 Vict. c. 39, s. 1 (1), did not afford the company a reasonable time to make up their minds as to whether they would appeal or not, and consequently that the October sessions were the next practicable sessions for the purpose; and he allowed the appeal to be then entered and respited.

Quain, Q.C., and *J. P. Thompson*, shewed cause. The 17 Geo. 2, c. 38, s. 4, which gives the appeal to "the next general or quarter sessions of the peace," requires a reasonable notice thereof to be given to the churchwardens or overseers. In Dickenson's Quarter Sessions, 5th ed. p. 633, it is said: "Most statutes limit the appeal to the *next* session, words which, unaccompanied by more express directions, have occasioned much controversy with respect to the moment from which the time for entering an appeal begins to be

(1) 27 & 28 Vict. c. 39, s. 1, enacts that, "before any appeal shall be heard by any special or quarter sessions against a poor-rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made, of the intention to appeal, and the grounds thereof, to the assessment committee of such union: Provided that, after the 1st of August next, no person shall be impowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them; and, if they amend the same, shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly."

1871

LIVERPOOL GAS CO. v. EVERTON.

reckoned. Generally speaking, in the absence of more specific provision, the terms 'next session,' or 'next quarter session,' mean the next possible or *practicable* session after the principal act done in each case; at which session an appeal, effectual with respect to its preliminaries of sufficient notice, recognizance, &c., can be lodged, not for respite or adjournment only, but for hearing: for, it is obvious that the sessions may be sitting at the time when the act occasioning the necessity for appealing happens, or may follow so soon after that the appellants would not have that reasonable time to which they are entitled, to consider, in the first instance, whether they should appeal or not, or, next, to prepare for trial by searching for evidence, giving the proper notice of appeal, &c." The Union Assessment Act (27 & 28 Vict. c. 39), s. 1, as a preliminary to the right of appeal, requires twenty-one days' notice to be given to the assessment committee. The appellants in this case, therefore, could not be bound to enter their appeal until they had had a reasonable time for determining whether they would or would not appeal against the decision of the committee, and for giving the notice required by that statute: *Reg.* v. *Biggleswade Union.* (1) It may be doubted whether the sessions held on the 1st of September, which were not the ordinary quarter sessions, but intermediate sessions fixed by the recorder, were quarter sessions at all within the meaning of 17 Geo. 2, c. 38. But, be that as it may, the recorder having decided in point of fact that the sessions held on the 26th of October were the next practicable sessions, and that there had been no unreasonable delay, it is not competent to this Court to review his decision upon a rule for a prohibition. These questions have generally arisen on mandamus, when the quarter sessions have refused to enter the appeal. In that form of proceeding the superior Court exercises a visitorial jurisdiction; but a prohibition lies only where the inferior Court assumes to act having no jurisdiction. In *Reg.* v. *Biggleswade Union* (1), Bovill, C.J., says: "It is difficult to ask us to say that the appellant in this case took more than a reasonable time before taking any step. We have no grounds given us for arriving at such a conclusion, even if we had power to enter into the question." So, here, the reasonableness of the delay was a question of fact for the recorder, regard

(1) 21 L. T. 494.

being had to all the circumstances before him, and especially to the difficulty of a trading corporation like these appellants getting together the proper persons to determine their course of action. In *Rex* v. *Justices of Essex* (1), where the question was whether an appeal against an order of removal was in time, Lord Ellenborough said: "The statute 13 & 14 Car. 2, c. 12, s. 2, certainly directs the appeal to be at the *next* quarter sessions, but that must mean the next practicable sessions. The parish officers must have a reasonable time allowed them to make the necessary inquiries, that they may judge of the propriety of appealing or not." "It has been said that, although the appeal could not have been heard at those sessions, still that it ought to have been entered and respited; but that would only be incurring a useless expense, without conferring any benefit on either party, and was therefore quite unnecessary." But, supposing it be competent to this Court to review the decision of the recorder, can they say that he was wrong in holding the six or seven days beyond the twenty-one days required for the notice to the assessment committee was more than a reasonable time for considering whether there should be an appeal or not?

Dowdeswell, Q.C., and *Segar*, in support of the rule. (2) The case of *Rex* v. *Biggleswade Union* (3) has no application here. The only question there was whether the parties were bound to go before the assessment committee before appealing. The proper course, no doubt, where the sessions refuses to exercise its jurisdiction, is, to apply for a mandamus; but prohibition will clearly lie where it assumes a jurisdiction which it has not. The same principle governs both courses of proceeding. In *Elston* v. *Rose* (4), where a prohibition was moved for to restrain a county court judge from proceeding in an ejectment where the value of the tenement exceeded 20*l.* per annum, Blackburn, J., said: "If the value of the land was above 20*l.*, there would be good ground for issuing the writ; and I am quite prepared to hold that, if the evidence upon that point was conflicting, that circumstance, though not conclusive upon us so as absolutely to deprive us of the discretionary power of granting the prohibition, would so far influence us that we

(1) 1 B. & A. 210.

(2) Quain intimated that he did not rely upon his first objection.

(3) 21 L. T. 494.

(4) Law Rep. 4 Q. B. 4.

1871

LIVERPOOL GAS CO. v. EVERTON.

should require very strong grounds before we should interfere. It is clear, in the present case, that what the judge found was simply that, taking his view of the law, and deducting the ground-rent, the value of the land was below 20*l*. I think that he was wrong in the conclusion at which he arrived, because he applied a wrong rule of law to the facts, and therefore that he had no jurisdiction:" and the rule for a prohibition was made absolute. The question before the recorder in the present case was a mixed one of law and fact, viz. whether or not under all the circumstances the September sessions was the next practicable sessions for entering the appeal. The case of *Reg.* v. *Eyre* (1) shews that the recorder was bound to enter and respite the appeal at the September sessions, even though there had been no notice. A subsequent case of *Reg.* v. *Eyre* (2) is to the same effect. In the present case there was abundant time for the appellants to enter their appeal at the next sessions; and the recorder had no jurisdiction to enter and respite it at the subsequent sessions. Cases of removal stand upon a totally different footing from poor-rate appeals; and therefore *Rex* v. *Justices of Essex* (3) does not apply. The notice required by 17 Geo. 2, c. 38, s. 4, to be given to the overseers is a fourteen days' notice. The twenty-one days' notice to the assessment committee required by 27 & 28 Vict. c. 39, s. 1, is something superadded, not for the benefit of the appellant, but for the convenience of the respondents.

[BRETT, J. The appeal could not be tried until the twenty-one days' notice had expired.]

There was nothing to prevent the appellants from entering and respiting the appeal within the twenty-one days.

[MONTAGUE SMITH, J. In *Rex* v. *Justices of Kent* (4) and *Rex* v. *Justices of Devon* (5), Lord Tenterden seems to think it idle to enter and respite an appeal, where it cannot be tried.]

In those cases there had been no time to give notice: and the observations of Lord Tenterden are modified by later cases: see *Reg.* v. *Peterborough Justices* (6), and *Reg.* v. *West Riding of York-*

(1) 6 E. & B. 992. 2 Jur. N.S. 1207
(2) 7 E. & B. 609; 26 L. J. (M.C.) 121. 3 Jur. N.S. 910
(3) 1 B. & A. 210.
(4) 8 B. & C. 639.
(5) 8 B. & C. 640, n.
(6) 7 E. & B. 643; 26 L. J. (M.C.) 153. 3 Jur. N.S. 888

shire Justices. (1) At all events, this is a matter that ought to be put in a train for solemn investigation, and therefore the prohibition ought to go.

KEATING, J. This is a case in which a rule has been obtained for a prohibition directed to the recorder of Liverpool, who appears to have entered and respited an appeal against a poor-rate under these circumstances:—A rate having been made, there was an appeal to the union assessment committee; and on the 3rd of August, 1869, the assessment committee refused to grant relief. That, as was decided in *Reg.* v. *Biggleswade Union* (2), was the terminus à quo for an appeal to the quarter sessions. It appears that there was a court of quarter sessions held at Liverpool on the 1st of September following; for, Mr. Quain very properly abandoned the objection he at first made to that intermediate session being considered a court of quarter sessions. The appellants did not enter and respite their appeal at those sessions; but at the next quarter sessions, which were held on the 26th of October, they appeared before the recorder and proposed then to enter the appeal; whereupon it was objected by the parish officers that the application was too late. The recorder appears to have been of opinion that the appellants were not bound to enter their appeal at the September sessions, because they were not the next practicable quarter sessions within the meaning of the Act of Parliament. The 27 & 28 Vict. c. 39, s. 1, enacts that, before any appeal shall be heard by any special or quarter sessions against a poor-rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made, of the intention to appeal, and the grounds thereof, to the assessment committee of such union. It seems that from the 3rd of August, when the relief was refused by the assessment committee, till the 1st of September, when the next quarter sessions were held, there was a period of twenty-eight days, which was time enough to give the twenty-one days' notice, and six or seven days to spare. The recorder was of opinion, looking at all the circumstances, that the

(1) E. B. & E. 713; 27 L. J. (M.C.) 269. (2) 21 L. T. 494.

1871

LIVERPOOL GAS CO. v. EVERTON.

parties should have a reasonable time to consider whether they would appeal or not, and that the seven days were not a reasonable time for that purpose, and therefore that the sessions held on the 1st of September were not the next practicable sessions. It has been contended, on the other hand, that the appellants were at all events bound to enter and respite the appeal at those sessions; and that, even if they were not bound to enter the appeal unless they could try at those sessions, here there was ample time to try the appeal. It is unnecessary to decide whether, if a party is unable to try, by reason of there being no sufficient time to give the notice, he is bound to enter and respite the appeal. Undoubtedly there are cases in which it has been held not to be necessary to enter and respite where the appeal cannot be tried; and those cases recommend themselves to one's judgment, seeing that the entry and respite would be an idle ceremony. But I do not wish to decide that question here, especially as the later cases seem to throw some doubt upon the matter. It is enough for us to say that in our judgment the recorder was wrong in holding that six or seven days were not sufficient time for the appellants to make up their minds as to the course they would adopt, and that the sessions held on the 1st of September were not the next practicable sessions. It was contended by Mr. Quain that this is a question of fact, and that it is not competent to this Court to reverse the recorder's decision upon it; though he seemed to admit that, if the recorder had refused to allow the appeal to be entered, the propriety of that refusal might have been questioned upon an application for a mandamus. It certainly would seem strange that the power of the Court to interfere should depend upon the form of the proceeding; and I am not aware that any such distinction exists. Indeed, Blackburn, J., in *Elstone* v. *Rose* (1), in terms says there is no such distinction, and that, where the Court below states facts which go to its jurisdiction, the superior Court has the same power to examine them whether on a motion for a prohibition or for a mandamus. Therefore, having jurisdiction to inquire whether the decision of the recorder in this case was right or wrong, and differing from him as to the sufficiency of time for appealing, I think the sessions held on the 1st of September were the next practicable

(1) Law Rep. 4 Q. B. 4.

sessions, and that the appellants had no right to enter and respite the appeal at the subsequent sessions held in October. I therefore think the rule for a prohibition should be made absolute.

MONTAGUE SMITH, J. I am of the same opinion. The learned recorder decided that the October sessions were the next practicable sessions at which this appeal could have been entered. He so decided upon the ground that there was not sufficient time between the refusal of relief by the assessment committee and the 1st of September for the appellants to determine whether they would give the notice required by the statute or not, and for giving the notice. In doing so, the recorder decides on a fact necessary to give him jurisdiction; and that, I think, is a decision which we have a right to examine upon an application for a prohibition. It is a condition precedent to his jurisdiction arising that the party should come at the next sessions after the wrong complained of. It being, then, our duty to examine the fact, the question is whether the recorder rightly decided that the October sessions were the next practicable sessions. I agree with my Brother Keating that we need not now decide whether, where there is only barely time to give the requisite twenty-one days' notice to the assessment committee, it is necessary to enter and respite the appeal at the next sessions. I agree that there is authority as well as reason against the necessity of such respite. But, upon an examination of the authorities, I think it will be found that it is only where the next sessions are the next practicable sessions that the party is bound to enter and respite the appeal. Undoubtedly it is for his benefit that the appeal should be entered and respited, for he thereby saves his appeal, where he may have given no notice or an insufficient one: but the decisions shew that, where the next sessions are not such sessions as are practicable for the trial of the appeal, he is not bound to enter and respite at those sessions. In *Rex* v. *Justices of Kent* (1), Lord Tenterden says: "It appears to me to have been wholly unnecessary to enter and adjourn the appeal at the first sessions, when they could not, according to the practice of those sessions, try it." Again, in *Rex* v. *Justices of Devon* (2), the same learned judge observes: "The entry for the mere purpose of

(1) 8 B. & C. 639. (2) 8 B. & C. 640, n.

1871

LIVERPOOL GAS CO. v. EVERTON.

adjournment is a useless act, and only occasions unnecessary expense." Patteson, J., in *Reg.* v. *Sevenoaks* (1), says: "The October sessions were the next practicable sessions, though it is now settled that the appellants were not compelled to try: but, then, in order to keep the appeal of which they served notice too late for trial alive, they were bound to enter and respite it at those sessions; for, it is only when the next sessions are so early as not to be practicable sessions that the appellants are entitled to pass them by entirely." The distinction will be found referred to in the recent case of *Reg.* v. *Justices of the West Riding of Yorkshire* (2), where Lord Campbell says: "The appellants undoubtedly might take all the time they did without losing their right to appeal: but, on the other hand, they might, if they had pleased, have applied for and obtained a copy of the depositions earlier, or, having received a copy of the depositions, might have given notice of appeal in time to try at the sessions held on the 5th of January last. Those sessions, therefore, were the next practicable sessions at which the appellants might, if they had been so minded, have entered and tried their appeal, according to the cases of *Reg.* v. *Justices of Peterborough* (3) and *Reg.* v. *Sevenoaks* (1), in which it was decided that an appellant cannot by his negligent or dilatory conduct make the sessions impracticable which in fact were practicable sessions, and then pass them wholly over as not being practicable. He ought at least to enter and respite his appeal, or it may be reasonably considered that he has given up the intention of really prosecuting the appeal, and only means to procrastinate as much as possible." In the present case, I think the rule should be made absolute, on the ground that the sessions which were held on the 1st of September were the next practicable sessions at which the appeal might have been heard. Whether they were so or not depends upon whether a week's time was not sufficient to enable the appellants to make up their minds whether they would appeal or not. I think we should be introducing great laxity if we were to decide that it was not enough, there being no special circumstances in this case to justify

(1) 7 Q. B. 136, 152; 14 L. J. (M.C.) 92.

(2) E. B. & E. 713, 717; 27 L. J. (M.C.) 269.

(3) 7 E. & B. 643; 26 L. J. (M.C.) 153.

1871

LIVERPOOL GAS CO. v. EVERTON.

a longer delay. Upon that ground, therefore, I agree with my Brother Keating in holding that the sessions held on the 1st of September were the next practicable sessions, and consequently that the recorder had no jurisdiction to enter and respite the appeal at the sessions held on the 26th of October.

6 Q B D 107 108

BRETT, J. I agree that the recorder had no jurisdiction to enter this appeal at the October sessions, unless those were the next practicable sessions after the decision of the assessment committee. He held that they were, on the ground that, although more than twenty-one days had elapsed, the excess (six days) was not a reasonable time for the appellants to make up their minds whether they would appeal or not. As I understand the case of *Elstone* v. *Rose* (1), it seems to have been assumed by the Lord Chief Justice, and it is declared expressly by my Brother Blackburn, that, if the recorder was wrong in so deciding, this Court may review his decision upon a motion for a prohibition. Taking into consideration all the circumstances of the present case, I think it is impossible to say that the parties could reasonably require six or seven days to make up their minds as to the propriety of appealing. I therefore think the recorder was wrong in point of fact, and that this rule should be made absolute.

Rule absolute.

Attorney for appellants: *G. L. P. Eyre, for Lloyd & Co., Liverpool.*

Attorney for respondents: *T. W. Goldring, for Holden & Cleaver, Liverpool.*

(1) Law Rep. 4 Q. B. 4.

1871
April 27.

STEWART *v.* ROGERSON.

Charterparty—Refusal to name a Place of Delivery—Measure of Damages—Freight—Demurrage.

By a charterparty the owner was to carry a cargo of coals to London, and there deliver the same "at a good and safe wharf" to the freighter or assigns, paying freight 6*s.* per ton, &c. One market-day to be allowed for sale, or 1½*d.* per ton additional freight for each market-day's detention thereafter.

The vessel came into collision with a steam-tug in the Thames, and was sunk with the cargo on board, but was got up, and on the afternoon of the 23rd of April arrived at a tier at Wapping, whither she was ordered by the harbour-master. Notice of her arrival was on the same day given to the agents of the freighter, and they were required to name a wharf; but they declined to do so. On the 24th the ship and freight were arrested by process out of the Admiralty Court in a suit instituted by the owners of the tug.

Upon a special case on which by agreement the Court were to draw inferences of fact:—

Held, that the plaintiff was entitled to recover, as damages for the refusal to name a wharf, and so refusing to accept the cargo, the amount he would have received as freight if the cargo had been duly delivered, there having been a complete breach before the arrest; but that he was not entitled to demurrage.

THIS was an action brought by the plaintiff, sole registered owner of the ship *Schiedam*, against the defendant, to recover freight and demurrage pursuant to a charterparty. (1) The following case was stated for the opinion of the Court under an order of nisi prius:—

1. The plaintiff is a master-mariner and the sole registered owner of the *Schiedam*, a vessel of 223 tons register, employed in the coal coasting trade.

2. The action was brought to recover freight and demurrage claimed by the plaintiff under a charterparty dated the 5th of April, 1869, under which the vessel was to proceed to Middlesborough Dock, and there take on board from the agents of the freighter a cargo of coals, and therewith proceed to London and there deliver the same at a good and safe wharf to the freighter or assigns, paying freight for the same 6*s.* per ton delivered in

(1) By the particulars of demand the plaintiff claimed 95*l.* 8*s.* for freight on 318 tons of coals, at 6*s.* per ton; and also 43*l.* 14*s.* 6*d.* for demurrage at 1½*d.* per ton for each of twenty-two market-days during which the ship was detained.

London; the master paying pilotage, trimming, delivery, tonnage-duty, half weighing, and the freighter all other charges: the act of God, &c., excepted. Freight to be paid in cash for ship's use, and the remainder by factor's note at sixty days date. One market day to be allowed the merchant (if the ship is not sooner dispatched) for sale, or 1½*d.* per ton additional freight for each market-day's detention thereafter, a regular turn for a weigher, and the vessel to be delivered at the rate of 49 tons per day.

3. The defendant in respect of this transaction acted for Compton & Co. The plaintiff knew that the coals were for Compton & Co.

4. In pursuance of the charterparty, the *Schiedam* duly loaded a cargo of 318 tons of coals from the Middlesborough Dock, and proceeded with the same on her voyage to London. She arrived in safety as far as Thames Haven, in the river Thames; but, while in her progress up the river, on the 18th of April, 1869, about one o'clock in the morning, she was run into and sunk by a steam-tug called the *Lord Warden.*

5. The ship *Schiedam* and her cargo were raised by one Meynell, and, after a delay of six days, was sufficiently repaired to proceed on her voyage. This she did, and on the afternoon of the 23rd of April arrived in the New Crane Tier, Wapping, and by order of the harbour-master moored there at a place called New Crane Mud. This is a place where from the softness of the mud ships which have sustained damages or injuries to their hulls can safely take the ground; and it is ordinarily reserved by the harbour-master for such ships. It was in the stream, and not alongside of a wharf.

6. Upon the arrival of the *Schiedam* at this tier, and on the same day, the captain applied to Compton & Co., the consignees of the cargo, for instructions as to the wharf to which he was to take the *Schiedam* for the purpose of delivering the cargo. The plaintiff could have taken the *Schiedam* to a wharf on that day; but Compton & Co. declined to name any wharf.

7. On the morning of the 24th of April, 1869, a suit was instituted by the owners of the steam-tug *Lord Warden*, in the city of London Court (Admiralty jurisdiction), against the *Schiedam*, to recover the damage caused by the aforesaid collision; and the ship

1871

STEWART v. ROGERSON.

Schiedam and the freight due for the transportation of the cargo were arrested by warrant of that court.

8. A cross-suit was instituted on the 10th of May, 1869, in the same court, by the plaintiff against the steam-tug *Lord Warden*, to recover the damage sustained by the *Schiedam* in the collision.

9. On the 28th of May, 1869, the two suits came on for hearing in that court, and judgment was pronounced dismissing the suit against the *Schiedam*, with costs, and giving judgment for the plaintiff in the suit against the *Lord Warden*, for 300*l.* and costs. The *Schiedam* was thereupon released from the arrest in that suit.

10. Previous, however, to such judgment, viz. on the 3rd of May, 1869, the salvor, Meynell, who had raised the *Schiedam* and her cargo (as stated in par. 5), instituted a suit in the City of London Court against the *Schiedam*, her cargo, and freight, to recover the amount due to him for salvage; and he caused the cargo and freight of the *Schiedam* to be arrested by warrant of that court.

11. On the 25th of May, 1869, a decree was made in the salvage suit, that the plaintiff should recover against the *Schiedam*, her cargo, and freight, the sum of 110*l.*, and costs.

12. On the 7th of June, 1869, default being made in payment of the 110*l.*, and costs, a warrant of execution was issued out of the court against the *Schiedam*, her cargo and freight.

13. Pursuant to this warrant, the high bailiff of the court seized the cargo, and on the 16th of June, 1869, sold the same on the London Coal Exchange, and paid into court the net proceeds of the sale, amounting to 87*l.* 9*s.* 4*d.* The plaintiff, as captain of the ship *Schiedam*, and under the orders and direction of the high bailiff, duly discharged the cargo into barges, and delivered the same to the purchasers thereof. The cargo was not in fact discharged from the ship until the 11th of June, 1869.

14. On the 25th of June, 1869, the *Schiedam* was released from arrest in the salvage suit, by an order of the Court.

15. On the 23rd of July, 1869, the Court made an order apportioning the amount of the salvage money and costs as follows, viz.: 61*l.* 10*s.* on the cargo, as and for the salvage on cargo and costs of suit, and 92*l.* 5*s.* 3*d.* on the ship *Schiedam*, as and for the salvage on the ship, and costs of suit.

16. Both of the warrants of arrest mentioned above were duly affixed in a conspicuous part of the *Schiedam*. Compton & Co., the consignees of the cargo, had prompt notice of the arrests. The defendant, who resided at Newcastle, and carried on business there and at Middlesborough, had no such prompt notice of the arrests, except so far as the affixing the warrant on the ship amounted to constructive notice thereof.

17. By reason of the above-mentioned circumstances, the *Schiedam*, with the cargo on board, remained lying in the river for twenty-two market days after the 23rd of April, 1869, and was unable during all that time to deliver the cargo, or any part thereof. Neither the defendant nor Compton & Co. took any steps (beyond ineffectually negotiating with the owners of the *Lord Warden* for a release on terms which were not agreed to) to obtain the liberation of the cargo from arrest, or to prevent its sale under the warrant of execution; nor did either of them give any instructions to the plaintiff relative to the cargo after its arrival in the Thames.

18. The amount of freight for the carriage of the coals, calculated according to the charterparty, is 95*l.* 8*s.*; and the amount for demurrage, also calculated according to the charterparty, is (if demurrage is payable) 43*l.* 14*s.* 6*d.*; making together 139*l.* 2*s.* 6*d.*, which sum, less 15*l.* advanced to the plaintiff by the Weardale Iron and Coal Company on account of Compton & Co., to whom they charged it, and who repaid it to them, the plaintiff seeks to recover in this action.

19. It is agreed that the Court may make any amendments in the pleadings and particulars which they may think required by the justice of the case, and that they may draw all necessary inferences of fact.

The question for the opinion of the Court was, whether, under the above-mentioned circumstances, the plaintiff was entitled to recover against the defendant in respect, first, of freight, secondly, of demurrage, or damages for the detention of the vessel.

Archibald (*Philbrick* with him), for the plaintiff. The vessel arrived at the tier to which she was ordered by the harbour-master on the 23rd of April, and notice of her arrival was given to the

1871

STEWART v. ROGERSON.

consignees on the same day, but they declined to name a wharf for her to proceed to for the delivery of the cargo. The plaintiff, therefore, having performed his contract so far as he could do so but for the refusal of the consignees to allow him to perform it, there was a complete breach on that day. The suit instituted by the owners of the *Lord Warden* did not prevent the consignees from receiving the cargo. Cargo is not liable in any case for the damage occasioned by a collision; and, if arrested, will be released on payment of the freight into court: *The Victor* (1): and the freighter is entitled to the costs of paying it into Court: *The Leo.* (2) If the cargo had been taken out, the plaintiff might have employed the vessel elsewhere.

[BOVILL, C.J. If the plaintiff relies on the refusal to name a wharf as the breach, is he entitled to claim demurrage?]

The owner would at least be entitled to a reasonable time to see whether the consignees would name a wharf before they unloaded.

A. L. Smith (*Garth, Q.C.*, with him), for the defendant. The plaintiff is not entitled to recover either in respect of freight or demurrage. The *Schiedam* was sunk on the 18th of April, at 1 A.M. She was raised, and arrived on the afternoon of the 23rd at New Crane Tier, Wapping; and on the 24th she was arrested. The vessel never did come to a safe wharf; and the morning of the 24th was the first moment when she could have commenced unloading. The cargo was then under arrest, as a guarantee for the freight: see Williams & Bruce Adm. Pr. 193. The freight upon a charterparty is not earned until the unloading and delivery of the whole cargo is completed: *Brown* v. *Tanner.* (3) The question is, whose duty was it to obtain the release of the cargo under rule 49. Clearly not the plaintiff's: see the judgment of Dr. Lushington in the case of *The Leo.* (4)

[MONTAGUE SMITH, J., referred to *Paynter* v. *James* (5).]

The plaintiff never was ready and willing to deliver the cargo.

(1) Lush. Adm. R. 72.

(2) Lush. Adm. R. 444. And see rule 49 of the Rules and Orders of 1859, which provides that "cargo arrested for the freight only may be released by filing an affidavit as to the value of the freight, and by paying the amount of the freight into the registry."

(3) Law Rep. 2 Eq. 806; 3 Ch. App. 597.

(4) Lush. Adm. R. 447.

(5) Law Rep. 2 C. P. 348.

It was no part of the consignees' duty to make an affidavit and pay the freight into the registry of the Admiralty Court. There is no pretence for the claim for demurrage.

Archibald, in reply, conceded that the plaintiff was not entitled to recover the freight as freight, but only as damages for the breach of contract in not naming a wharf, and that the claim for demurrage could not be sustained.

BOVILL, C.J. In this case it is agreed that the Court shall be at liberty to draw inferences of fact: and the inferences I draw are, that, on the 23rd of April the plaintiff was ready and willing to take the vessel to a safe wharf if one had been named by the consignees; and that they were not only not ready and willing to name a wharf, but positively refused to do so. The fair inference from that is that the consignees declined to take the cargo. That was a breach of duty; and, being a wrongdoer, it was for the defendant to excuse himself for the consequences of that breach. The question then is, what damages the plaintiff is entitled to. By the wrongful act of the defendant he has been prevented from earning freight. The measure of damages, therefore, will be the sum which the plaintiff has been prevented from earning. It is said that circumstances subsequently arose, viz. the arrest of the ship and freight on the 24th of April, which prevented the delivery of the cargo. But that does not relieve the defendant from the consequences of the breach of his contract. Suppose after his refusal to name a wharf the vessel had been lost, would the defendant be excused from paying damages on that account? The warrant from the Admiralty Court of the 24th of April was for the arrest of the "ship and freight." Cargo is not liable in a collision suit; the Admiralty Court has no right over it as a property: but, the cargo being on board, and the owner having a lien upon it for freight, the warrant attaches upon it for the purpose of securing that right. In that sense only was the cargo arrested here. It would have been released on payment of the sum due for freight. I am of opinion that the plaintiff is entitled to recover the amount of the freight which he would have earned but for the defendant's breach of contract; and I think the claim for demurrage was very properly abandoned.

1871

STEWART v. ROGERSON.

BYLES, J. I am of the same opinion. We being judges of the facts as well as of the law, and having power to draw inferences, the fair inference as it seems to me is that the vessel with the coals on board arrived at her destination on the 23rd of April, that the defendant was asked to name a wharf, but refused to do so. That was a clear breach of duty on his part. It is like the ordinary case of a tender, where the actual production of the money is waived.

MONTAGUE SMITH, J. I am of the same opinion. According to the doctrine laid down in this Court in *Paynter* v. *James* (1), the delivery of the cargo and the payment of freight were to be concurrent acts. Now, what are the facts here? The plaintiff was ready on the 23rd of April to take the ship to a wharf named, and there deliver the cargo. The defendant declined to name a wharf, consequently he was not ready and willing to receive the cargo. It is said that the plaintiff was not ready to deliver the cargo on the 24th, by reason of the arrest of the ship and cargo under the Admiralty warrant. Assume that the cargo was arrested, for the purpose of getting at the freight, it is clear that that arrest would have been taken off on payment of the sum due for freight; and I see nothing to warrant the inference that the plaintiff would not have himself paid the freight if the defendant had recalled his refusal to accept the cargo: on the contrary, I think the fair inference is that, if any readiness to accept the cargo had been shewn by the defendant, the plaintiff was ready to go and pay the money into court. The defendant, however, never did recall his refusal to accept. It seems to me, therefore, that the plaintiff was ready and willing to deliver, but that the defendant was not ready and willing to accept the cargo and to pay the freight. The result is that the plaintiff is entitled to recover damages to the extent of the sum he would have received if the defendant had performed his contract. It is not necessary to decide whether or not it was the defendant's duty to go to the court and tender the freight: but I am by no means prepared to say that he ought not to have done so. The substituted mode of payment cannot alter

(1) Law Rep. 2 C. P. 348.

the rights of the parties. Undoubtedly either the shipowner or the freighter might have paid the money: and I infer that, if the defendant had been ready to accept the cargo, the plaintiff would have done all that was necessary to enable him to deliver it.

BRETT, J. If the Court had not been at liberty to amend the pleadings and to draw inferences of fact, I should have had some difficulty in agreeing that the plaintiff was entitled to recover. It is clear the plaintiff is not entitled to recover the freight as freight. By the misfortune of the plaintiff, the defendant could not get the cargo by simply going to the ship and paying the freight. To my mind, the cargo was lawfully seized. It is true that the only persons liable in the collision suit were the owners of the ship. The proceedings are in rem: the owners are liable to the extent of the value of the ship and freight. But, in order to exercise the jurisdiction of the Admiralty Court, and to exercise it in rem on the freight, the Court takes certain proceedings, one of which is to seize the cargo: see the judgment of Dr. Lushington in the case of *The Leo*. (1) Once seized, the freighter could not get his goods by going to the ship and paying the freight. I think he was not bound to go to the Admiralty Court and pay it there, whether the seizure arose from the fault or the misfortune of the plaintiff. If the action is only maintainable for not naming a wharf, I very much doubt that the amount of the freight would be the proper measure of damages, because that can hardly be said to have been the proximate cause of the non-delivery. But, having to draw inferences from the facts, I cannot see any answer to the inference drawn by my Lord and my learned Brothers, that the refusal to name a wharf was with intent to decline to accept the cargo; and the defendant having once done so, he was not at liberty afterwards to call on the plaintiff to take any steps to release the cargo. I think the defendant is liable, under the particular circumstances of this case, in an action for refusing to accept the cargo and pay the freight, without being able to deny that the plaintiff was ready and willing to deliver. I ground my judgment upon this: that it is to be taken as a fact that the defendant refused to accept the cargo, and therefore relieved the plaintiff from the

(1) Lush. Adm. R. 444.

1871

STEWART v. ROGERSON.

necessity of going to the Admiralty Court and paying in the amount due for freight, in order to release the cargo. Upon a declaration in that amended form the plaintiff is entitled to judgment.

Judgment for the plaintiff for 95*l.* 8*s.*

Attorneys for plaintiff: *Lowless & Nelson.*
Attorneys for defendant: *Shumm & Crossman.*

END OF EASTER TERM, 1871.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS

IN AND AFTER

TRINITY TERM, XXXIV VICTORIA.

THE ALLIANCE BANK, LIMITED *v.* KEARSLEY.

1871
May 24.

Partner—Authority of—Banking Account opened by one Partner on behalf of Firm in his own name—Ordinary Scope of Partnership Business.

There is no implication of law from the mere existence of a trade partnership that one partner has authority to bind the firm by opening a banking account on its behalf in his own name.

DECLARATION. Common counts for money lent by the plaintiffs to the defendant, for interest, and on accounts stated.

Plea: never indebted. Issue.

At the trial, before Willes, J., at the Manchester Spring Assizes, 1871, the facts were as follows:—

The plaintiffs were a banking company, and they sought to recover in the action the balance of a banking account alleged by them to be due from the defendant, William Kearsley. In 1864 the defendant and his brother, James Kearsley, carried on business in partnership at York and Manchester as coachbuilders, under the firm of George Kearsley & Co. James Kearsley managed the

1871

ALLIANCE BANK v. KEARSLEY.

business at Manchester, and William, the defendant, that at York. In January, 1864, James Kearsley called on the plaintiffs' branch bank in Manchester, and stated that he wished to open an account for the coachbuilding business in Manchester, but that as he was the only resident partner in Manchester, and as he alone would sign the cheques, the account had better be opened in his name. An account was accordingly opened; and when that account was closed, which was in September, 1869, it was overdrawn to the amount which was now sought to be recovered. There was no evidence of any express authority from William Kearsley to James to open an account in his own name on behalf of the firm. Upon these facts the learned judge ruled that a partner had no implied authority to bind his firm by a banking account opened in any other name than that of the firm, and that consequently the defendant was not liable. The verdict was accordingly entered for the defendant.

A rule nisi was subsequently obtained for a new trial, on the ground that the above ruling was a misdirection.

Holker, Q.C., and *Jordan*, shewed cause. The question in these cases is not whether the firm obtained the benefit of the contract, but whether the firm, by one of its partners, entered into the contract: see Lindley on Partnership, 2nd ed. p. 364. So the question here is whether James Kearsley bound the firm by his act in opening this account. It is not within the ordinary scope of the partnership business that one partner should open a banking account on behalf of the firm otherwise than in the name of the firm. The leading case on the subject is *Emly* v. *Lye*. (1) There the partner drew bills in his own name, which were discounted, and the proceeds paid to the account of the firm, and it was held that the firm was neither liable on the bills themselves nor for their proceeds. Similarly, in *Kirk* v. *Blurton* (2), it was held that a partner has no implied authority to bind his co-partners by his acceptance of a bill of exchange except by an acceptance in the true style of the partnership. Alderson and Rolfe, BB., in giving judgment in that case, both lay it down as a general rule that a partner has only authority to bind the firm in the name of the

(1) 15 East, 7. (2) 9 M. & W. 284; 12 L. J. (Ex.) 117.

partnership. This is not the case of an ordinary loan to one partner, to be applied to the partnership purposes; the opening of this account involved a series of cross items, every one of which was created by the drawing of a negotiable instrument otherwise than in the name of the firm; so that the principle of the decision in *Kirk* v. *Blurton* (1) clearly applies. In the notes to *Sandilands* v. *Marsh*, Tudor's Leading Cases on Mercantile Law, 2nd ed. p. 302, where the authorities are all collected, it is laid down that the partnership will not be bound by any contract entered into by one of the partners if it be not in the name of the partnership, even although it may have derived a profit thereby.

[They also cited *Keane* v. *Beard* (2), *Lloyd* v. *Freshfield* (3), and *South Carolina Bank* v. *Case.* (4)]

Pope, Q.C., and *R. G. Williams*, supported the rule. This is really nothing more than the ordinary case of a loan contracted by one partner for partnership purposes. It is clear law that in the case of mercantile partnerships one partner can make the firm liable for money advanced for the purposes of the partnership business. The cases that have been cited with reference to bills of exchange have no bearing on this case. There the attempt was to make the partnership liable on, or by virtue of, the instrument. This obviously could not be done according to the ordinary rules of law with relation to such instruments. But the bank does not sue on the cheques: so far as they are concerned they are mere evidence of the authority to make the payment which constitutes a loan from the bank to the customer. According to the ordinary usage of bankers, the cheque, when paid, is considered to belong to the drawer and is returned to him. The case is no other than if one partner wrote a letter in his own name requesting a loan on behalf of the partnership. All the cases where it is laid down that the use of the partnership name is necessary to bind the firm are cases with relation to the drawing, indorsing, or accepting of bills and other negotiable instruments. It has never been held that the use of the partnership name is necessary with respect to an ordinary loan of money. *Lloyd* v. *Freshfield* (3) is no authority for that proposition. In fact, it rather

(1) 9 M. & W. 284; 12 L. J. (Ex.)117.
(2) 8 C. B. (N.S.) 372.
(3) 2 C. & P. 325.
(4) 8 B. & C. 427.

1871

ALLIANCE BANK v. KEARSLEY.

assumes the contrary of it with relation to ordinary mercantile partnerships: see the observations of Bayley, J., in that case.

[MONTAGUE SMITH, J. It is to be observed that in that case the defendants were not a mercantile firm, but a firm of attorneys.]

The case of *Cooke* v. *Seeley* (1) is a strong authority in the plaintiffs' favour. It was there held that the fact of an account having been opened with a banker by one of two partners in his own name is not conclusive to shew that the account was opened on his own behalf; but it is competent to the banker to shew that he was acting as agent for the partnership, and the account was theirs. No doubt the only question there was, whether the fact of the account being in the name of one partner was conclusive; but the expressions used by the judges go a great way in favour of the plaintiffs' contention: see also *Sims* v. *Bond* (2), and *Sims* v. *Brittain*. (3)

[They also cited *Denton* v. *Rodie* (4); *Willet* v. *Chambers* (5); *Nicholson* v. *Ricketts* (6); *Beckham* v. *Drake* (7); Story on Agency, § 124; Grant's Law of Bankers, 2nd ed. p. 31; *Rothwell* v. *Humphreys*. (8)]

KEATING, J. I am of opinion that this rule should be discharged. The question is, whether one partner has an implied authority to open a banking account on behalf of the firm in his own name. There was no evidence in this case of any express authority to do so. I am not prepared to affirm the proposition that there is such an implied authority. No case has been cited to us in which the question whether there is such an authority has ever been decided or even arisen. The case has been likened by the plaintiffs' counsel to the case of an ordinary loan, and it has been argued that as one partner has authority for trade purposes to contract a loan so as to bind the firm so he has authority to do what James Kearsley did in this case. It appears to me that there is a broad distinction between the case of a mere loan and the opening of a banking account. The latter involved the drawing of cheques,

(1) 2 Ex. 746; 17 L. J. (Ex.) 286.
(2) 5 B. & Ad. 389.
(3) 4 B. & Ad. 375.
(4) 3 Camp. 493.
(5) Cowp. 814.
(6) 2 E. & E. 497.
(7) 9 M. & W. 92; 7 L. J. (C.P.) 93.
(8) 1 Esp. 406.

and what amounted to a succession of mutual loans. Can the opening of such an account in the name of one partner be said to be done in the ordinary course of the business of a partnership of the description in which William and James Kearsley were engaged? No evidence was given that such a transaction would be within the ordinary scope of such business. If this is a question depending upon matters of fact in relation to the character of the business, and which would be a subject of evidence, it seems to me that the onus of proof lies on the party alleging that the transaction is within the ordinary scope of the partnership business. The question therefore for us on this rule seems to be simply whether, as a proposition of law, a partner has the implied authority here contended for; and for my part I am not disposed to affirm the proposition.

MONTAGUE SMITH, J. I am of the same opinion. The question is, whether from the mere fact of the relationship of partners it is to be implied that an authority has been conferred on one of the partners to open a banking account on behalf of the partnership in his own name. It seems to me that, in the absence of any evidence of express authority, or of usage of this particular partnership or trade, it cannot be affirmed as a proposition of law that any such authority arises from the mere fact of partnership. The partner has authority to do what is usual in the ordinary course of the business. It is established that in trade partnerships one partner may borrow money for the partnership, and will bind his co-partner by so doing. That is held to be within the implied authority of a partner because it has been found to be in the ordinary course of business necessary for the purposes of trade. But I do not think a judge can take upon himself to assume, without evidence, that it is within the ordinary course of business for one partner to open a banking account in his own name on behalf of the partnership so as to bind his co-partners to the state of that account whatever it may be. That being so, the foundation of the implied authority entirely fails. There was no evidence in the present case of express authority or ratification, and the whole case, therefore, resolves itself into the naked question whether, without evidence one way or the other, and simply on the knowledge which the Court has of

1871

ALLIANCE BANK v. KEARSLEY.

the relationship of partners, and the light derived from decisions as to the extent of the authority of a partner, the Court can say that there is the implied authority contended for. The counsel for the plaintiffs have been unable to bring forward any case in which it has been decided that the opening of a banking account by a partner in his own name is within the scope of the ordinary authority conferred by partnership. It seems to me that it might be a dangerous proposition of law to lay down that there is such an authority. An account opened by a man in his own name is primâ facie his private account, and it seems likely that such an implication of authority would give great facilities for mixing up private and partnership accounts so as to enable frauds to be committed with less chance of detection. Therefore I think that we ought not without evidence to assume as a proposition of law that such an implied authority exists. The onus of proof of authority lies on the party seeking to affect another by such authority. The plaintiffs here, as it seems to me, have failed to sustain this onus, and therefore I am of opinion that the case was rightly withdrawn from the jury.

WILLES, J. I am of the same opinion. It occurred to me at the trial that this was a case of the first impression unless there was evidence of express authority. I did not mean to lay it down—the decision referred to in *Cooke* v. *Seeley* (1) would have been directly to the contrary—that two partners could not adopt the name of one for the purpose of carrying on business at a particular place. In this case, for instance, William and James Kearsley might have agreed that business should be carried on in the name of one at York and the other in Manchester. But they did not do so; they both agreed that the name of George Kearsley & Co. should be the name under which the business should be carried on, and each was to bind the other in that name. Primâ facie, therefore, in order to bind the firm, the partners ought to have used that name, as was held in the cases that have been cited with relation to negotiable instruments, on which it was sought to render partnerships liable.

This case was likened by the plaintiffs' counsel to an ordinary

(1) 2 Ex. 746.

loan effected by one partner for partnership purposes, and the observations of Bayley, J., in the case of *Lloyd* v. *Freshfield* (1) were referred to on that subject.

It may have been decided that in the ordinary case of money being borrowed by a partner on behalf of a trade partnership, the other partners are bound; and we are no doubt bound to follow such decision, though the hardship is often great when such borrowed money is applied in fraud of the partnership. But that is not the present case. It is within the ordinary experience of business that a person engaged in trade should borrow for the purposes of his trade. It may therefore be within the ordinary scope of a partnership business that one partner should borrow money for the purposes of the business of the firm. But it is not in the ordinary course of business for a partner to open a banking account for the firm in a name other than that of the firm. No evidence was given in this case of any special circumstances relating to this particular partnership or trade to shew that the opening of such an account was within the ordinary course of the business. For these reasons I think the rule should be discharged.

Rule discharged.

Attorneys for plaintiffs: *Pritchard & Englefield*, for *Grundy & Co.*

Attorney for defendant: *Leigh.*

(1) 2 C. & P. 325.

1871
May 26.

LOVEGROVE *v.* WHITE.

Attorney and Client—Authority of Attorney after Judgment—Agreement to postpone Execution.

An attorney retained for the conduct of an action has no implied authority, after judgment in favour of the client, to enter into an agreement on his behalf to postpone execution.

Declaration (in substance), that the plaintiff being indebted to the defendant in the sum of 30*l.*, the defendant commenced an action in the county court against the plaintiff for the recovery of such debt, and before the trial of the action, to wit, on the 7th of June, 1870, the plaintiff gave and delivered to the defendant a consent in writing that judgment should be entered up in the county court against the plaintiff for the sum of 30*l.*, and 2*l.* 1*s.* costs, upon the condition in the said consent expressed, that the judgment should not be enforced for a certain space of time, to wit, till the 12th of July, 1870; and afterwards, and before the expiration of the said period, to wit, on the 9th day of July, 1870, the plaintiff paid to the defendant the sum of 15*l.* on account of the said judgment so recovered, and the plaintiff took and accepted the said sum of 15*l.* in part satisfaction of the said debt and costs, and in consideration thereof and of the premises undertook and agreed to and with the plaintiff that the said judgment in respect of the balance, to wit, the sum of 17*l.* 1*s.* then remaining due, should not be enforced against the person or goods of the plaintiff for a certain further space of time, to wit, till the 12th day of August, 1870. Breach, that the defendant before the said 12th day of August, 1870, to wit, on the 26th day of July, 1870, put an execution into the plaintiff's premises for the full amount of the judgment, viz., 34*l.* And the plaintiff was obliged to pay the full amount of the judgment, and was deprived of the use, possession and enjoyment of his goods, and was greatly injured in his credit and reputation, and lost the said sum of 15*l.* so paid by him, and otherwise sustained considerable loss and damage.

Pleas (inter alia), denying that the plaintiff paid and the defendant accepted the said sum of 15*l.*, or any part thereof, on account

of the judgment as alleged, and that the defendant undertook or agreed as alleged. Issue.

At the trial before Byles, J., at the Middlesex sittings after Hilary Term, it appeared that the now plaintiff had consented to a judgment against him in the county court action as alleged in the declaration, and that before the expiration of the month which the judgment gave for payment of the amount he called on the defendant's attorney in the county court action, Mr. Tweed, and offered to pay him 15*l.* on account immediately if a month's further time was allowed him for the payment of the balance, and that Tweed agreed to this on the defendant's behalf, and received the 15*l.* There was no evidence of any express authority from the defendant to Tweed to enter into such an arrangement. (1)

The learned judge allowed the case to go to the jury on the question, among others in dispute, whether Tweed had authority to enter into the arrangement giving time for payment of the balance of the amount of the judgment. The jury having found for the plaintiff, a rule nisi was obtained inter alia for a new trial on the ground of misdirection by the judge in not ruling that Tweed had no authority to bind the defendant by entering into the agreement.

W. Y. Clare shewed cause. The defendant was bound by the agreement entered into by his attorney. The retainer is not terminated by judgment, and it has been held that it continues so as to warrant the attorney in issuing execution within a year and a day, or afterwards, in continuation of a former writ of execution

(1) One of the questions in dispute in the case was, whether the defendant had ever retained Tweed as his attorney in the county court at all. The fact was, that the defendant had authorized one Hussey, an auctioneer, to take proceedings to obtain payment of a debt from the plaintiff, and Hussey had instructed Tweed to bring the action in the county court. The question was whether, under the circumstances of the case, Hussey had any authority to employ Tweed, an attorney not being necessary in a county court case, or whether there was any evidence of ratification of such employment by the defendant. At the time when the defendant put in the execution he knew nothing of the payment of 15*l.*, or the arrangement entered into by Tweed. As the judgment of the Court proceeded on the ground that even if Tweed were defendant's attorney to bring the county court action he had no authority to enter into the agreement to give further time, it is not thought necessary to refer in the report to the facts with relation to the original retainer.

1871

LOVEGROVE v. WHITE.

issued within that time, and also to warrant his receiving the damages without a writ of execution. See per Parke, B., in *Bevins* v. *Hulme.* (1) The cases of *Savory* v. *Chapman* (2), and *Connop* v. *Challis* (3), are not authorities against the plaintiff's contention, for there the attorney ordered the discharge of a debtor taken under a ca. sa., which he clearly had no authority to do, inasmuch as such a discharge operated as an extinguishment of the debt. In *Savory* v. *Chapman* (4), Littledale, J., says, "The authority of an attorney in general is determined after judgment, but he may still sue out execution and receive the money." It is clear, therefore, that the attorney, even after judgment, has authority to take all steps which may be reasonable and proper under the circumstances of the case with respect to obtaining the fruits of the judgment. He also cited *Latuch* v. *Pasherante* (5); *Lamb* v. *Williams* (6); *Bayley* v. *Buckland* (7); *Levi* v. *Abbott.* (8)

Cole, Q.C., and *Beresford*, supported the rule. An attorney employed to conduct an action has no implied authority to bind his client by entering into an agreement to postpone execution. Even if there were such an implied authority in relation to an action in the superior courts, there is no such authority in relation to a county court action; for in such an action an attorney is not authorized to receive payment of the amount of the judgment. By the form of the judgment it is to be paid to the registrar of the court for the plaintiff.

KEATING, J. This is an action for the breach of an alleged agreement, and that agreement not having been entered into by the defendant himself it lies upon the plaintiff to shew that the person who actually entered into it had authority to do so on the defendant's behalf. This the plaintiff sought to do by shewing that Tweed was the defendant's attorney for the purposes of the county court action, and that the defendant having obtained a judgment in that action, Tweed entered into an agreement by which, in consideration of a payment of £15 before the time at which the

(1) 15 M. & W. 96; 15 L. J. (Ex.) 226.
(2) 11 A. & E. 829; 9 L. J. (Q.B.) 186.
(3) 2 Ex. 484; 17 L. J. (Ex.) 319.
(4) 11 A. & E. 829, 836.
(5) 1 Salk. 86.
(6) 1 Salk. 88.
(7) 1 Ex. 1.
(8) 4 Ex. 588; 19 L. J. (Ex.) 62.

sum recovered was by the terms of the judgment payable, the defendant was to give a month's further time for payment of the balance. The evidence was conflicting as to whether this agreement ever was made, but it must be taken for the present purpose that it was made. But the defendant contends that even if it was made he is not bound by it, inasmuch as Tweed had no express authority to make it, and his employment as attorney in the county court action gave him no implied authority to do so. I am of opinion that this contention is correct. This is not the case of the acceptance merely of a particular mode of payment of a judgment. The attorney here affects to bind his principal to a contract to postpone the enforcement of the judgment for the breach of which such principal might be made liable by action, and for which he is in fact sought to be made liable by the present action. I think that that is beyond the attorney's authority. My Brother Byles appears to have been of that opinion at the trial, and to have expressed himself as being so, though he thought it better to take the opinion of the jury on the questions of fact. Under these circumstances I think there must be a new trial, unless the parties can agree to a stet processus.

MONTAGUE SMITH, J. I am of the same opinion. This action is founded on a supposed misfeasance by the defendant in issuing execution on a judgment obtained in the county court after an agreement made by Tweed, who was alleged to have been his attorney in the county court action. The case depends on the question whether Tweed had authority to make this agreement. My Brother Byles appears to have been of opinion at the trial that upon the facts of the case the plaintiff was not entitled to maintain the action, but to have left the case to the jury in the expectation that they would come to the same conclusion. They, however, came to the opposite conclusion, and so it now becomes necessary for us to consider whether there was any evidence of authority for them. I think there was none. The case was put in two ways by the defendant: first, on the ground that there was no evidence of any retainer of Tweed by the defendant at all; and, secondly, that if he were retained in the county court action that did not give him authority to make this agreement. I do

1871

LOVEGROVE v. WHITE.

not think there was any evidence of retainer at all; but, assuming that he was employed as attorney in the action, I do not think that gave him authority by implication to enter into this agreement. It was argued on the defendant's behalf that the duty of an attorney in a county court action ends with the judgment, because the amount of the judgment is thereby directed to be paid to the registrar of the court. It is unnecessary to decide this point, because, assuming that the authority of the attorney is the same in a county court action as in an action in a superior court, I think that authority only goes to the extent of authorizing him to do his best for the purpose of obtaining the fruits of the judgment for his client. He has, no doubt, control over the process of execution so far as such purpose is concerned, but that he has not complete control over it is shewn by the decision, that if the debtor has been taken on a ca. sa. he cannot consent to his discharge; though in the case of a fi. fa. he can consent to the withdrawal of it, as in *Levy* v. *Abbott*. (1) If it is for the advantage of the client, he may accept payment of the debt by instalments, but he cannot, I think, enter into a binding agreement that execution shall not issue for a given period of time. If such an agreement were within the scope of his authority, he might bind his client not to issue execution for a year, or for any length of time, and subject him to an action for non-performance of the agreement. This is totally different from accepting payment of a judgment by instalments which imposes no obligation on the client, and is, as it seems to me, obviously quite beyond the scope of his duties as attorney in the action.

BYLES, J., concurred.

Rule absolute.

Attorney for plaintiff: *Lovegrove.*
Attorney for defendant: *Sealey, for Bond.*

(1) 4 Ex. 588; 19 L. J. (Ex.) 62.

THE BURIAL BOARD OF THE PARISH OF ST. MARGARET, ROCHESTER *v.* THOMPSON.

1871
June 1.

Burial-ground established under the Burial Acts—Sexton, Right of, to enter Burial-ground to perform Duties without Consent of the Burial Board—Deputy—15 & 16 *Vict. c.* 85, *s.* 32.

The 32nd section of 15 & 16 Vict. c. 85, preserves to the sexton of a parish the right of performing, in the burial-ground established under that Act, his duties as sexton in respect of the burial of parishioners and inhabitants of the parish; and the burial board are not entitled to refuse to allow him to perform those duties on the ground that they choose to have them performed by their own servants. The sexton can, therefore, justify an entry on the ground, notwithstanding the board's refusal to admit him, in order to perform his duties under circumstances in which he would have been entitled to perform similar duties in the old parish burying-ground.

It is the intention of 15 & 16 Vict. c. 85, that the burials of parishioners in the consecrated part of the new burial-ground, established under that Act, shall be conducted with the same ceremonies and in the same manner as they would have been in the old parish burying-ground, and the effect of the 30th and 32nd sections, taken together, is to make the chapel erected in the consecrated part of the new burial-ground a substitute for the parish church for the purposes of such burials. The sexton is, therefore, entitled to toll the bell in the chapel at such burial, the tolling of the bell being part of the burial rite of the Church of England.

The sexton may delegate the performance of his duties to a deputy.

DECLARATION for that the defendant broke and entered a certain bell-tower and lands of the plaintiffs, situate in the parish of St. Margaret, Rochester, called the "Cemetery," and made a great noise and disturbance therein, and made divers holes, excavations, and graves in the said land.

Pleas: 3. As to the alleged trespasses on the land in the declaration mentioned other than those to which the 4th and 5th pleas are pleaded, that the said lands are situate in the parish of St. Margaret, in the city of Rochester, and within the diocese of the Bishop of Rochester, and before the time of the said alleged trespasses on such lands the said bishop had, in due form of law, consecrated such lands for the purpose of interments therein in accordance with the sacred rites and customs of the Church of England, and the said bishop had appointed in due form of law a certain time, which before the said alleged trespasses had elapsed, when such con-

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

secrated portion of the said lands should be deemed to be and become, and at the time of the said alleged trespasses such land had become, the consecrated burial-ground of the said parish for which the same had been provided; and the defendant says that the said parish of St. Margaret is an ancient parish, of which one Alfred Kingsford was before and at the time of the said alleged trespasses the clerk and sexton, and, by reason of the premises, of right, at the time of such alleged trespasses, was entitled as such clerk and sexton to perform and exercise all the duties and functions of right belonging to the said office of clerk and sexton in respect of the burial of the remains of the parishioners and inhabitants of the said parish in such consecrated burial-ground, the same being the burial-ground of the said parish as aforesaid, as he had previously performed and exercised the like functions and duties; and the defendant, as the servant and by the command of the said Alfred Kingsford, as such clerk and sexton as aforesaid, dug and excavated the earth and soil of the said consecrated burial-ground, and made holes, excavations, and graves therein, for the burial therein of the remains of the parishioners and inhabitants of the said parish [at reasonable and proper times and places, and in a reasonable and proper manner] (1), and thereby performed and exercised the lawful duties and functions in respect of such burials of the remains of the parishioners and inhabitants of the said parish, to be performed and executed in the said consecrated burial-ground by the said clerk and sexton of the said parish, and appertaining to the office of the said Alfred Kingsford as such clerk and sexton as aforesaid of the said parish, and the lawful duties of the defendant as his servant, and which are the alleged trespasses in the said declaration mentioned, and to which this plea is pleaded.

4. As to the alleged trespasses in the bell-tower in the declaration mentioned, that at the time the said land in the last plea mentioned was, as is therein stated, consecrated by the said Bishop of Rochester, in whose diocese the said land is situate, and the same thereby became and was the consecrated burial-ground of the said parish of St. Margaret, for which the same was provided (as in such plea is stated), there was before and at the time of

(1) The words in brackets are an amendment of the plea, which it was agreed during the argument should be made.

such consecration, and at the time when the same became and was the burial-ground of the said parish, upon such land, and forming part and parcel thereof, a certain chapel with a bell-tower attached thereto, and which is the bell-tower mentioned in the said declaration; and at the time of such consecration of the said land so consecrated the burial-ground of the said parish, the said bishop did then and there also, at the same time, consecrate, as part and parcel of such burial-ground, the said chapel with the said bell-tower attached thereto, for the performance of the sacred services of the Church of England, and the several duties and functions to be performed therein by the said clerk and sexton of the said parish in and about the performance of the rites and ceremonies to be performed by the said clerk and sexton in the said chapel and bell-tower in respect of the interment of the dead in the said burial-ground, in accordance with the rites and ceremonies of the Church of England, and the said chapel, with the said bell-tower thereto belonging, did then become, and was at the time of the alleged trespasses to which this plea is pleaded, a consecrated part and parcel of the said burial-ground, to be used therewith and as part thereof; and the defendant says that the said parish of St. Margaret is an ancient parish, of which the said Alfred Kingsford was, before and at the time of the alleged trespasses to which this plea is pleaded, the clerk and sexton, and by reason of the premises in this plea stated, of right at the time of the trespasses to which this plea is pleaded was entitled, as such clerk and sexton, to perform and exercise all the duties and functions appertaining to his said office of clerk and sexton of the said parish in the burial of the remains of the parishioners and inhabitants of the said parish in such consecrated burial-ground, and the said chapel and bell-tower, part of such burial-ground as aforesaid of the said parish, in accordance with the rites and ceremonies of the Church of England; and the defendant, as the servant and by the command of the said Alfred Kingsford, as such clerk and sexton as aforesaid, entered the said bell-tower and remained therein for a considerable time, for the purpose of tolling the sacred bell therein, and during such time did then and there toll the said bell therein, in the part performance and exercise of the lawful duties and functions to be performed and exercised as of right by the said Alfred Kingsford

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

as such clerk and sexton as aforesaid in the lawful and accustomed performance of the said rites and ceremonies appertaining to the burial of the remains of the parishioners and inhabitants of the said parish in the said consecrated burial-ground of the said parish, as he had previously performed and exercised the like duties and functions, in accordance with the accustomed rites and ceremonies of the Church of England, and which are the alleged trespasses in the said declaration mentioned, and to which this plea is pleaded.

Replications: To the third plea, that the said lands, &c., were consecrated by the said bishop in the said plea mentioned, and after the making and passing, and coming into force, and under and by virtue of an Act of Parliament made and passed in a session of parliament holden in the 20th and 21st years of the reign of Her Majesty Queen Victoria, intituled "An Act to amend the Burial Acts" and other the statutes in and by the said first-mentioned Acts recited and referred to, and not otherwise; and that the said lands in which, &c., became, and at the times when, &c., were such burial-ground as in that plea mentioned, under and by virtue of the enactments and provisions in the said statute contained, and not otherwise; and the general management, regulation and control thereof were vested in the plaintiffs as such burial board as aforesaid, under and by virtue of and in accordance with the provisions of the said statutes; and the plaintiffs further say, that the defendant committed the said trespasses to which that plea is pleaded without the leave, licence, or consent of the plaintiffs to him given or granted, and in defiance of and contrary to their express command, notice, and requirement, in that behalf, of all which premises the defendant at the time of the committing of the said trespasses had notice.

To the 4th plea, a similar replication.

Demurrers to the 3rd and 4th pleas.

Demurrers to the replications, and joinder in demurrer. (1)

(1) The 15 & 16 Vict. c. 85, s. 32, enacts as follows: "From and after the consecration as aforesaid of any burial-ground provided under this Act (except any portion thereof intended not to be so consecrated), or where all or any part of such burial-ground, by reason of the same having been already consecrated, shall not require to be consecrated, then, from and after such time as the bishop of the diocese shall appoint, such burial-ground shall be deemed the burial-ground of the parish for which the same is provided; and where the same

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

Sir J. B. Karslake, Q.C. (*Barrow* with him), for the plaintiffs. The plaintiffs do not question the sexton's right to his fees; they say that he has no right given to him by the statute to enter the burial-ground against their consent. The rector had by law the control over the churchyard as having the freehold, and had a right to appoint where the graves should be dug. The burial board is placed in the position of the rector. According to the defendant's contention, as contained in the plea, the sexton has a right, in defiance of any regulation of the board, to go in and dig a grave at any time, and in whatever part of the ground he pleases. He does not rejoin that the refusal of consent was unreasonable or unjustifiable.

[The COURT intimated their opinion that the pleas should be amended, if necessary, so as to raise the substantial question as to the sexton's rights under the statute under ordinary circumstances, and not any question with reference to an attempt to exercise such rights at a time or in a way that would be unreasonable or improper. It was agreed, therefore, that both the 3rd and 4th pleas should be considered as amended by the insertion of the

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is provided for two or more parishes such burial-ground shall be in law as if such parishes were one parish, and as if such burial-ground were the burial-ground of such one parish; and every incumbent or minister of the parish, or of each of the parishes (as the case may be), for which such burial-ground is provided shall, by himself and his curate, or such duly qualified persons as such minister or incumbent may authorize, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial-ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister; and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received; and the clerk and sexton of such parish, or of each of such parishes, shall (when necessary) perform and exercise the same duties and functions in respect of the burial of the remains of parishioners or inhabitants of the parish of which he is clerk or sexton in such burial-ground, or the consecrated portion thereof, and shall be entitled to receive the same fees on such burials, as he has previously performed and exercised and received, as if such burial-ground were the burial-ground of the respective parish of such incumbent or minister, clerk and sexton respectively; and the parishioners and inhabitants of such parish, or of each of such parishes, shall have the same rights of sepulture in such burial-ground as they respectively would have had in the burial-ground or burial-grounds in and for their respective parishes; subject, nevertheless, to the provisions herein contained."

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

words above contained in brackets in the third plea, or similar words.]

Assuming that the defendant entered and dug the graves at a reasonable time and place, the question is, whether the sexton has any right to enter against the consent of the burial board, who are the owners of the soil. It is contended that he would have had no such right against the rector in the case of the old churchyard. His remedy for being prevented from exercising his right would be by action for disturbance in his office, or some other legal process, but he could not justify a trespass. Then what is his position under the statutes with relation to new burial-grounds? By the 38th section of 15 & 16 Vict. c. 85, the general management, regulation, and control of the ground is vested in the board. The 32nd section relates to the position of the sexton. It provides that the sexton shall only exercise his functions in respect of the burial of parishioners "when necessary." If the board, in the exercise of their general power of control, and of the power given them by the 15th section to appoint such officers and servants as may be necessary for the purposes of the burial-ground choose to provide for the digging of graves, and performance of funerals otherwise than by the sexton, they are entitled to do so; the sexton's performance of these duties then becomes unnecessary. The only other possible construction is, that he is not to dig graves when they are not necessary. This is to give no effect to the words at all. Then, again, in the same section, with respect to the incumbent and the parishioners, the word "rights" is used, but no such word is used with respect to the sexton. It is not contended that he is not entitled to have the fees.

[WILLES, J. Who is to receive them if he be excluded? The Act does not provide that the servants of the board are to do so.]

The officials of the board may receive them on his behalf, and if so received, they would be money paid for his use.

[WILLES, J. How can he recover the fees, if unpaid, without having done the work?]

The statute gives him a right to them, whether he has done the work or not. With respect to the ringing of the bell, the sexton's right at law is to toll the bell of the parish church. There is nothing in the statute which obliges the board to have any bell at

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

all in the new burial-ground. If it is optional with them to provide a bell, the sexton cannot be entitled to ring the bell.

[KEATING, J. Is not the burial to be performed in the consecrated ground according to the service of the Church of England, and is not tolling the bell part of the service?]

The 67th canon directs the tolling of the bell, but it is submitted that if it be necessary it must be done in the old parish church. There is nothing to give any right to do it in the chapel of the burial-ground.

Then, secondly, the sexton could not delegate the performance of his duties to a deputy. The sexton has a discretion to exercise with respect to the position of graves if the rector do not interfere, which his official knowledge of the ground and other circumstances peculiarly fit him to exercise. The rector, in whose position the burial board now stands, would not be bound if the sexton sent a grossly improper person, to allow him to dig the graves. [He cited *Day* v. *Peacock* (1), and *Gell* v. *Mayor of Birmingham* (2).]

Prideaux, Q.C. (*F. J. Smith* with him), for the defendant. The sexton has an office known to the law, and it is his duty to dig the grave and toll the bell at funerals of parishioners, and a mandamus will lie to restore him to his office: *Rex* v. *Kingsclere* (3); *Rex* v. *Liverpool* (4). The incumbent could, no doubt, appoint the place in the ground for the grave, but it was the right of the parishioners to be buried, which he could not interfere with. It must be taken on the pleadings that a proper place was selected for these graves, to which no objection was taken. What the board claims is, an absolute right to exclude the sexton, and perform his functions by their own servants. The 32nd section of the Act preserves the office of sexton, and provides that he is to perform the same duties in the new burial-ground as in the old churchyard. It is obvious from the whole of the section that the legislature intended that the new ground should be put as far as possible in the position of the old churchyard, and that parishioners should be entitled to be buried in the same manner and with the same service as before. The words "when necessary" mean simply when the occasion arises. The

(1) 18 C. B. (N.S.) 702; 34 L. J. (C.P.) 225.
(2) 10 L. T. (N.S.) 497.
(3) 2 Lev. 18.
(4) 3 T. R. 118.

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

case of *Gell* v. *Mayor of Birmingham* (1), which has been cited in the plaintiffs' favour, came before the Court of Queen's Bench again, on a case stated by an arbitrator for the opinion of the Court. The objection taken was, that the services of a clerk were not necessary. The Court held that the words did not mean what was absolutely necessary, but what was customary and proper for the performance of the burial service: see Glen's Burial Board Acts, 2nd ed. p. 68. (2) The 15th section, which gives the right to the board to appoint servants for the purposes of the burial-ground, only gives the right to appoint such servants as shall be necessary. It was not necessary to appoint any one to do what the sexton was prepared to do.

The right to the sexton's fee depended on his doing the duty: see *Burdeaux* v. *Lancaster*. (3) The Act clearly preserves the sexton's right to fees; the right to receive the fees cannot be intended to be separated from the obligation to perform the duties of sexton. The case of *Day* v. *Peacock* (4), with respect to the right of the incumbent to receive the fees and perform the duties, was decided on this principle, and is clearly in point. There is no power given to the board to receive these fees and to pay them over to the sexton. The only event in which these fees are payable to the board is, when the provisions of the 37th section are put into effect by the vestry, which is not the case here. It is quite clear that the sexton has power to appoint a deputy, his functions being of a ministerial character: *Walsh* v. *Southworth* (5), and *Nichols* v. *Davis*. (6) [He also cited *R.* v. *Ashton* (7), the 67th canon; *Pearce* v. *Rector of Clapham* (8), and *Ashby* v. *Harris*. (9)]

Sir J. B. Karslake, Q.C., in reply.

WILLES, J. We are to take it in this case that the pleadings stand amended so as to raise the real question between the parties.

(1) 10 L. T. (N.S.) 497.

(2) The case referred to was decided on the 7th of June, 1867, in the Queen's Bench, but is not reported. A short note of it is given in Glen's Burial Board Acts, but the reference to 10 L. T. (N.S.) 497, there given, is erroneous; the report there being of the same case at a previous stage.

(3) 1 Salk. 332.

(4) 18 C. B. (N.S.) 702; 34 L. J. (C.P.) 225.

(5) 6 Ex. 150; 20 L. J. (M.C.) 165.

(6) Law Rep. 4 C. P. 80.

(7) Sayer, 159.

(8) 3 Hagg. 16.

(9) Law Rep. 3 C. P. 523.

The case may therefore be looked upon as if the facts were as follows: a parishioner of the parish of which Kingsford is clerk and sexton was lying dead, and his body required burial, and occasion had therefore arisen for digging a grave and providing for his burial according to the usages of the Church of England; the sexton proposed to prepare the grave and have the bell rung, and appointed the defendant as his servant to do those things; the defendant was absolutely forbidden by the burial board to do what the sexton had directed him to do, on the ground that they thought proper to do these things for themselves, and did not intend that the sexton should do them; and the defendant, being sent by the sexton for the purpose, insisted, notwithstanding the board's prohibition, in doing these acts, as the plea now stands, at a reasonable and proper time and place. The acts in question therefore were done under circumstances in which it would ordinarily have been proper, and the sexton would have had a right to do them, and there would have been no ground for the rector's preventing him from doing them, if this had been the case of a burial in the old parish burying-ground or churchyard. Two questions arise upon this state of facts: the first is, whether the board had a right to do these acts for themselves, and forbid the sexton from doing them. No questions now arise as to whether the board are not entitled to insist upon these acts being done at certain reasonable times, or whether the sexton could select a place for the grave which would be unreasonable, or contrary to the directions of the board. I think it would be competent to the board to regulate these matters. But it must be assumed, on the pleadings as they now stand, either that the place selected for the graves dug was that usually employed for the purpose, or actually pointed out by the board, as that where graves were to be dug for the time being, or that, the body of a parishioner actually requiring burial, the board refused to point out a place, and the sexton thereupon selected a reasonable place for the purpose. Nor are we called upon, I think, to enter into the question suggested in argument as to what would be the result if the sexton appointed a grossly improper or incompetent person to perform his duties. This is not a case likely to occur; the sexton holds an office in respect of which he is entitled to the protection of the law, and till the contrary

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

appears we must give him credit for having proceeded as a public official should. The only other question, therefore, is, whether, assuming that the sexton himself would have been entitled to do these acts, he could appoint a deputy to do them.

The first and main question depends on 15 & 16 Vict. c. 85. When that Act was passed the state of the law was this: in respect of Christian parishioners lying dead there was a right in their representatives or the public, whether based on any private right, or public decency, or the usages of religion, to have the dead body disposed of within the consecrated churchyard with the ordinary services incidental to such burial. For the purposes of such burial there were several officers. In respect of the religious service there was the clergyman. He usually had the freehold of the burial-ground, and therefore had the right of exercising control over the question in what part of such ground the grave should be. He had originally the appointment of the sexton. To the sexton belonged the ministerial office of digging the grave and preparing for the burial; under ordinary and reasonable circumstances of time and place he would not be interfered with by the rector, and would be allowed to do those offices, in respect of which he received certain fees and payments. Now, it seems to me that the Act in question was passed with reference to the clear right, ordinarily recognised by the rector, that the sexton should be employed to do these duties, and paid these fees in respect of them. It was said that the rector might interfere and discharge the sexton, and in cases of misconduct might lawfully so discharge him. Such would be unusual cases, and if they should again come into existence the proper legal consequences would follow; but the legislature did not intend to deal with these exceptional cases; they framed this Act with a view to the ordinary position of rector and sexton in respect of the latter's duties: Ad ea quæ frequentius accidunt adaptantur jura. Instead of compensation such as was occasionally given under the older statutes relating to the same subject-matter, they gave the sexton a right to perform in the cemetery the same duties as before in the churchyard, in respect of which fees were to be paid to him. This seems clear from the 32nd section. That section provides that the incumbent or minister of the parish for which such burial-ground is provided shall, by himself or his curate, &c., perform the duties,

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

and have the same rights and authorities for the performance of religious service in the burial in such burial-ground or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received. The incumbent is not merely entitled to go and perform the service, but he is bound to do so. The burial is to be by the clergyman of the parish, and to be a religious service, accompanied by the same ceremonies and usages as if it had taken place in the churchyard. There must, therefore, be some provision for the person to dig the grave and perform the ordinary ministerial services connected with the funeral. Accordingly we find by the section, "and the clerk and sexton of such parish shall (when necessary) perform and exercise the same duties and functions in respect of the burial of the remains of parishioners or inhabitants of the parish of which he is clerk or sexton in such burial-ground, or the consecrated portion thereof, and shall be entitled to receive the same fees on such burials as he has previously performed and exercised and received." The section then concludes by providing that this performance of duties and payment of fees shall be "as if such burial-ground were the burial-ground of the respective parish of such incumbent or minister, clerk and sexton respectively, and the parishioners and inhabitants of such parish shall have the same rights of sepulture in such burial-ground as they respectively would have had in the burial-ground in and for their respective parish, subject, nevertheless, to the provisions herein contained." With respect to the meaning of the words "when necessary" I cannot read them as distinguishing the position of the sexton from that of the incumbent, who has a right to bury, and of the parishioners who have a right to sepulture. I read the words as referring to the rights so preserved, and not as including only the necessity for the mere taking a spade and digging the graves, but as meaning "when necessary" in respect of the right of the parishioners to be buried in the manner and with the assistance of the persons who usually perform the services connected with burial in consecrated ground, and the right of the clergyman to perform the service in the customary manner with the assistance of his own clerk and sexton;

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

they refer not only to the necessity of preserving public health and decency by disposing of the corpse out of the way, but to the right of the parishioners to have the body dealt with in the cemetery in the same way as in the churchyard, and the propriety and duty of having the religious services performed on the occasion of a burial in the manner in which they are ordinarily performed. It must be remembered that the burial board, as owners of the cemetery, are public trustees; they only hold the ground subject to the provisions of the statute. There may possibly be general provisions in the Acts which taken alone might point to a conclusion favourable to their contention in respect of the matter now in question, but if special provisions are found which expressly point to the same matter we must be guided mainly by those special provisions, according to the well-known rule of construction: generalia specialibus non derogant. It seems to me, therefore, that when the necessity arises for digging a grave the Act clearly gives the right to dig the grave to the sexton.

Then had the sexton a right to toll the bell? That question appeared to me at first sight to involve somewhat different considerations. His right at common law would be to toll the bell of the parish church, and he could only be entitled to toll the bell of the chapel erected by the board in the cemetery by virtue of some express provision to that effect. The question is, whether, taking the 30th and 32nd sections together, the bell which is put up in the chapel is not, for this purpose, in the same position as the bell of the parish church. As to the latter, no difficulty could arise. It is clear, from the 67th canon and the authorities, as, for example, the judgment of Sir William Wynne in *Pearce* v. *Rector of Clapham* (1), and 1 Burns' Ecclesiastical Law, 9th ed., by Phillimore, p. 134, that tolling a bell at funerals is to be considered as a necessary and proper part of the usual service.

Then with respect to the bell in this chapel. The 30th section provides that it shall be lawful for the board to lay out any burial-ground provided by such board in such manner as may be fitting and proper, and to build, on any land to be purchased or appropriated for a burial-ground under this Act, and according to a plan to be approved of by the bishop, a chapel for the performance of

(1) 3 Hagg. 16.

the burial service according to the rites of the United Church of England and Ireland. The bishop would refuse to consecrate the building unless there were proper provisions for the usual services according to the rites of the Church of England. Taking these provisions in connection with those of the 32nd section, which authorizes the incumbent to perform the service, and gives him the same rights and authorities as if the burial-ground were the parish burial-ground, it is obvious that the incumbent is entitled to perform the service in the chapel so put up, and to perform it according to the rites of the Church of England, and that the effect of the two sections is to make the chapel erected under the 30th section, for the purpose of divine service at funerals, a substitute for the parish church. It follows, therefore, that the ringing of the bell, like the digging of the grave, is to be done, as is the usual way, by the officer of the incumbent, to assist in the performance of the burial-service, i.e., the sexton. It was urged that the right of the sexton was subject to the right of the rector to forbid the ringing of the bell; and the burial board, with respect to the bell in their chapel, might likewise forbid it. Granting that, under certain circumstances, the rector might have power to prevent the bell being rung—as, if a sick person lay near—though every one knows what difficulty there is in taking any such course, is the burial board intended to be put in the place of the rector, and entitled to say whether the canon shall be fulfilled or not? I think that if there be such a power in the rector, under peculiar circumstances, it is clearly reserved to him, and is not transferred to the board. But, as before stated, as to the question of reasonableness of time and place with respect to digging the grave, we are here dealing with ordinary circumstances, and under these the 32nd section preserves to the sexton the rights and duties which under the same circumstances he would have been allowed to exercise and perform by the rector.

The second question was, whether the sexton was entitled to appoint another person to dig the grave and ring the bell. It was argued that the maxim "Delegatus non potest delegare" applied. If a person is appointed to some function, or selected for some employment, to which peculiar personal skill is essential —as a painter engaged to paint a portrait—he cannot hand it over

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

to some one else to perform; but where the thing to be done is one which any reasonably competent person can do equally well, or when any discretion to be exercised is in respect of a merely ministerial act, a deputy may be appointed. It seems to me clear that acts to be done by the sexton fall within the latter class. It was pointed out that there might be more burials to be prepared for than one man could attend to, and it would be absurd to suppose that such burials should be delayed until the sexton could personally provide for them. For these reasons I am of opinion that our judgment must be for the defendant.

KEATING, J. I am of the same opinion. We must take it, on the pleadings as amended, that the defendant, being the servant of the sexton, entered the cemetery for the purpose of digging graves under circumstances in which, if it had been the old parish churchyard, the sexton would have been justified and authorized to dig these graves. It is now alleged that he did the acts in question at a reasonable time and place, and in a reasonable manner. Under these circumstances, the clergyman, under the old system, would not have interfered with him. That being so, the question arises, whether the burial board have the right to prevent his doing these acts simply on the ground that they are ready themselves to do them by their own servants. I am clearly of opinion that they have not. I confess, looking to the purview of the statutes, and the obvious general intention of the legislature, I am somewhat surprised that this question should have ever been raised. It is plain that the intention was, as far as possible, to preserve the old state of things, only substituting a new consecrated ground for the old parish churchyard. The provisions with relation to the control of the bishop and the incumbent all point in this direction. Then the words with relation to the sexton, taken alone, seem perfectly clear: "The clerk and sexton of such parish shall, when necessary, perform and exercise the same duties and functions in respect of the burial of the remains of parishioners or inhabitants of the parish of which he is clerk or sexton in such burial-ground, or the consecrated portion thereof, and shall be entitled to receive the same fees on such burials as he has previously performed, and exercised, and received." It appears to me

that the construction attempted to be given to the words "when necessary" by the plaintiffs is a very forced one. They simply mean, in my opinion, "when occasion arises." I should be at a loss to suggest words that could more plainly express an intention of preserving to the sexton all the rights and duties which belonged to his office under the existing state of things. It seems to me, therefore, that the contention of the board amounts to this, that the statute, having not merely given the sexton authority, but imposed on him the obligation, to perform these functions, and given him the right to receive fees only in consideration of his so performing them, nevertheless it was intended that he should be relieved from them, still continuing to receive the fees if the board provided servants to perform them. Such provisions would be very strange and unreasonable. For my own part, I doubt very much whether the board can throw on the rates the expense of providing persons to dig graves, which the Act says shall be dug by the sexton. It is not necessary, however, to deal with that question. I think, therefore, that the third plea is good. With respect to the fourth plea, as to the ringing of the bell, I agree with what has been said by my Brother Willes. It is plain that the intention was that the burial should be conducted with precisely the same ceremonies as in the parish churchyard, from the provision that the bishop shall approve the plan of the chapel. The bishop would not approve of any chapel which did not provide for such ceremonies. I also agree that the sexton could delegate the performance of the acts in question to the defendant.

MONTAGUE SMITH, J. I am of the same opinion. The board's contention is, that they have power to exclude the sexton altogether from the ground and the performance of his duties, provided they themselves are willing to perform them by their own servants. This really amounts to contending that they are entitled to appoint a sexton of their own. It seems to me that this would be a plain violation of the intention of the Act. As I understand the scheme of legislation contained in the Act by which the board is authorized to provide this burial-ground, it was intended to substitute such burial-ground for the old parochial churchyard, and to place it, as far as possible, in the same position with regard to

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

the employment of the religious rites and ceremonies, and the ordinary usages and observances of burials in accordance with the practice of the Church of England. With regard to the sexton, the Act imposes upon him the duty of performing the functions which he previously performed, and in the performance of which the parishioners are interested, and gives him, at the same time, the right of receiving the fees which he was accustomed to receive in respect of those functions for his own benefit. It is contended by the board that the sexton has no duties to perform in the cemetery if they think fit to do, by their servants, the duties which he would otherwise have done; and the words "when necessary," in the 32nd section, are relied on as shewing that to be so. I agree with my Brothers in thinking that those words only mean "when occasion arises." Reliance was also placed by the counsel for the plaintiffs on the 38th section, which gives the general management, regulation, and control of the ground to the board; but that is to be "subject to the provisions of this Act." The board may have the general management and control, subject to the right of the sexton, and it may well be that the sexton would be bound, in the exercise of his right, to conform to any reasonable rules as to the time when, and the place where, the graves should be dug, which might be laid down by the board. But if no such rules be laid down, and the board merely insist on an absolute right to exclude, then the question arises as to what power the sexton has of enforcing his rights. It was said that he had no power to enter against the will, and dig without the consent of the board, because he would not have the right to do so against the incumbent. It may be that the rector, as owner of the soil, and invested with general control over it for church purposes, might direct the sexton when and where he should dig the graves, and subject to proceedings for reinstatement in his office, might exclude him from the churchyard; but it seems to me that the board are not in the position in which the rector was. The powers of the rector are by the statute limited, as to the cemetery, to certain religious duties, and the duties of the sexton are prescribed by express statutory enactment. He is to perform the same duties as he previously performed. If the board said they would not bury a dead body, it would, by the statute, be the sexton's duty

1871

BURIAL BOARD OF ST. MARGARET, ROCHESTER, v. THOMPSON.

to bury it; it would be monstrous to say that he could not enter to perform his functions with regard to the body so waiting for burial, but must seek a remedy by proceedings at law. He has, in my opinion, express statutory authority for the performance of the duty of burial and all things necessary thereto. With respect to the question as to the bell, I have nothing to add to what has been already said. The ringing of the bell was a function of the sexton before the Act. It seems to me not only proper but necessary that the board should provide such a bell as essential to part of the burial rites of the Church of England, and that when so provided the sexton was entitled to ring it.

Judgment for the defendant.

Attorney for plaintiffs: *Sismey.*
Attorneys for defendant: *Sandys & Knott.*

GANN *v.* JOHNSON.

June 3.

Practice—Costs—Appeal to Exchequer Chamber—Affirmance of Court below by Exchequer Chamber, and Reversal by House of Lords.

The plaintiff in an action having obtained a verdict, a rule to enter a nonsuit was afterwards made absolute. The plaintiff appealed to the Exchequer Chamber, which affirmed the decision of the Court below. He then appealed to the House of Lords, which reversed the decision of the Exchequer Chamber, making no order as to costs of the appeal to that Court. Upon taxation the master refused to allow the plaintiff his costs of the appeal to the Exchequer Chamber:—

Held, on application to the Court to review the taxation, that he was right in so refusing.

Peek v. *North Staffordshire Ry. Co.* (4 B. & S. 627) commented upon.

THIS was an action of trover in which the plaintiff obtained a verdict. A rule nisi to set aside the verdict, and enter a nonsuit pursuant to leave reserved, was obtained, and ultimately made absolute. (1) The plaintiff appealed to the Court of Exchequer Chamber, which affirmed the decision of the Court below. (2) The plaintiff then appealed to the House of Lords, which reversed the decision of the Common Pleas and Exchequer Chamber, and

(1) See the report in 11 C. B. (N.S.) 387.

(2) See report in 13 C. B. (N.S.) 853, 861.

1871

GANN v. JOHNSON.

ordered judgment to be entered for the plaintiff, making no order as to the costs of the appeal to the Exchequer Chamber. (1) On taxation, the master refused to allow the costs of the appeal to the Exchequer Chamber.

June 3. *Willis* moved for a rule nisi for a review of taxation. The plaintiff is entitled to the costs of the appeal to the Exchequer Chamber. The question depends upon the 41st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which gives to the Court of Appeal the power of giving such judgment as ought to have been given below. It must now be taken that both this Court and the Court of Exchequer Chamber have given the decision which, according to the judgment of the House of Lords, they ought to have given, and that the plaintiff has been the successful party through all the stages of the litigation. Upon the affirmance of the decision of the Court of Common Pleas in the Exchequer Chamber the respondent would be entitled to his costs of the appeal. The case therefore of *Peek* v. *North Staffordshire Ry. Co.* (2) is distinctly in point.

[WILLES, J. Each Court of Appeal is to give the judgment that the Court below should have given. In *Peek* v. *North Staffordshire Ry. Co.* (2) the Exchequer Chamber ought to have affirmed the decision of the Court below. In this case it ought to have reversed the decision. In the former case costs would be given according to the usual rule of practice; in the latter they would not.]

[He also cited *Young* v. *Moeller* (3), *Cooper* v. *Slade* (4), and *Mackersy* v. *Ramsays.* (5)]

WILLES, J. I am of opinion that there should be no rule. The plaintiff succeeded in the House of Lords after being defeated in this Court and in the Exchequer Chamber. The present applica-

(1) The case of *Gann* v. *Johnson* is not reported in the House of Lords, but that case depended upon the same principles as, and was argued with, the *Free Fishers of Whitstable* v. *Gann*, reported 11 C. B. (N.S.) 287, and 13 C. B. (N.S.) 853. The latter case is reported in the House of Lords, 11 H. L. 192.

(2) 4 B. & S. 627.

(3) 6 E. & B. 681.

(4) 1 E. & E. 336; 28 L. J. (Q.B.) 82, 83.

(5) 9 Cl. & F. 818.

tion is for the costs of the appeal to the Exchequer Chamber. The Exchequer Chamber affirmed the decision of this Court, and, according to the usual course in such cases, gave costs to the respondent. The House of Lords reversed the decision of the Exchequer Chamber, but did not give the plaintiff the costs of the appeal to the Exchequer Chamber. The ordinary practice is, that the Court of Appeal gives costs to a successful respondent, but not to a successful appellant. This is clearly laid down in the case of *Young* v. *Moeller*. (1) Any departure from that rule is exceptional. The power of giving costs depends on the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). By the 41st section of that Act "the Court of Appeal shall give such judgment as ought to have been given in the court below, and all such further proceedings may be taken thereupon as if the judgment had been given by the Court in which the record originated." That power, no doubt, is given to the House of Lords; and when the House of Lords has reversed the decision of the Exchequer Chamber, which had itself reversed the decision of the original Court, so as in fact to affirm the judgment of such original Court, then, no doubt, in the exercise of the power given to it as a Court of Appeal under the Act, viz., to give such judgment as the Court below ought to have given, the House of Lords might properly give the costs of the appeal to the Exchequer Chamber to the respondent, imputing to the Exchequer Chamber that if it had affirmed the decision of the Court below it would have given such costs. In the case of *Walsh* v. *Trimmer* (2) the House of Lords acted on this principle. There the Court of Exchequer Chamber had reversed the decision of the Court of Queen's Bench, and the House of Lords reversed the decision of the Exchequer Chamber. It is clear that the costs applied for in that case and granted were the costs of the appeal to the Exchequer Chamber. The House of Lords there did that which was done in the case of *Peek* v. *North Staffordshire Ry. Co.* (3) There is no case in which the House of Lords has given costs to the appellant on a constructive reversal by the Court of Exchequer Chamber of the Court below. By the 42nd section of the Act it is provided that the Court of Appeal

(1) 6 E. & B. 681. (2) Law Rep. 2 H. L. 208.
(3) 4 B. & S. 627.

1871

GANN v. JOHNSON.

shall have power to adjudge payment of costs. This power is discretionary, and the costs may be given or not by the Court of Appeal, though the established practice is what I have stated. The result is this: If the Exchequer Chamber had done what, according to the decision of the House of Lords it ought to have done, it would not have given the appellant the costs he now seeks. He now seeks to get those costs, though the House of Lords was not applied to to give them; and any one reading the judgment of Lord Wensleydale in the House of Lords (1) would see that it would probably not have given them if applied to. Under these circumstances I do not see how we can give these costs. The case of *Peek* v. *North Staffordshire Ry. Co.* (2), which was said to be an authority in favour of this application, was a somewhat remarkable decision. The conclusion at which the Court arrived in that case was practically correct; for, no doubt, the Exchequer Chamber, on affirmance of the decision of the Court below, gives costs to the respondent; and so where there was a constructive affirmance of the Court below by the Exchequer Chamber, by reason of the House of Lords reversing the decision of the Exchequer Chamber, the House of Lords would give the costs of the proceedings in the Exchequer Chamber. But the correct and regular mode of obtaining these costs would appear to be by application to the House of Lords. As soon as it is established that the power given by the 42nd section to give costs is discretionary, of course it follows that the Exchequer Chamber might or might not give these costs. Then, as the House of Lords, by s. 41, has the same power as the Exchequer Chamber, it follows that the power of the House of Lords to give the costs of the proceedings in the Exchequer Chamber is likewise discretionary. One cannot help thinking that the decision in the case of *Peek* v. *North Staffordshire Ry. Co.* (2), though very convenient, seems rather like an assumption by the Court from which the appeal originally came of a jurisdiction given by the 41st section to the Court above. Wightman, J., in that case, refers to Reg. Gen. 25, as to Pleading of Trinity Term, 1853, by which the costs of proceedings in error are to be taxed and allowed as costs in the cause. It was, perhaps, on the supposed applicability of this rule

(1) 11 H. L. at p. 210. (2) 4 B. & S. 627.

that the Court acted; but, whatever may have been the grounds of that decision, it is unnecessary for us to dissent from it, inasmuch as it is not applicable to the present case. It proceeded on a constructive affirmance by the Exchequer Chamber of the Court below. To the case of a reversal of the Court below it is obvious that the same reasoning does not apply.

MONTAGUE SMITH, J. I am of the same opinion. The right to the costs depends on statute, and the successful party must shew that he is entitled to them under the statute, either as the necessary consequence of the judgment, or by the award of some competent tribunal having discretionary power to give them. It does not appear to me that the plaintiff here has brought himself within either of these alternatives. The House of Lords, which gave final judgment, was not asked to award—or, if asked, has not awarded—these costs. Then it was contended that, notwithstanding this, the plaintiff was entitled to costs of the appeal to the Exchequer Chamber, because the effect of the decision of the House of Lords was that the judgment of the Exchequer Chamber ought to have been one of reversal. But what authority have we in the matter? The Court of Exchequer Chamber, by s. 42, had a discretionary power to give costs or not. This discretionary power the Court, no doubt, have so far bound by a rule of practice that they do not give costs when the judgment is one of reversal. Though that is the ordinary rule, we are now asked to interfere and give these costs, because the Exchequer Chamber ought to have reversed the judgment of this Court. I think we have no power to award these costs; the House of Lords alone had power to do so, and they have not done so. Mr. Willis has contended that the successful party is entitled to costs. If this were the rule, he would be equally entitled in all cases, as a matter of course, to the costs in the House of Lords as well as in the Exchequer Chamber, but that is not the case. With respect to the case of *Peek* v. *North Staffordshire Ry. Co.* (1), I confess I feel some difficulty in seeing on what legal foundation the Court proceeded. But it is sufficient for the present purpose to say that that case is clearly distinguishable from the present.

Rule refused.

Attorney for plaintiff: *Towne.*

(1) 4 B. & S. 627.

1871
June 7.

KING AND OTHERS *v* ZIMMERMAN AND OTHERS.

Practice—Lost Bill—Costs—Indemnity—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 87.

The defendants in an action on a bill of exchange, pleaded the loss of the bill by the plaintiffs. The plaintiffs, who had offered no indemnity to the defendants before action, sought under the 87th section of the Common Law Procedure Act, 1854, to get the pleas setting up the loss of the bill struck out, on their giving an indemnity to the defendants against any claims by other persons on the bill.

The Court made it a term of the order granting the relief prayed for by the plaintiffs that they should pay the defendants' costs of the action.

THIS was an application to set aside or vary an order made at chambers, under the following circumstances:—

The action was upon a bill of exchange by the indorsees against the acceptors.

The defendants pleaded (inter alia) two pleas, setting forth in somewhat different terms the fact that the plaintiffs had lost the bill and were not ready to deliver the same to the defendants on payment thereof.

The plaintiffs did not offer any indemnity to the defendants against claims on the lost bill before action. Immediately after service of the writ the defendants took out a summons calling on the plaintiffs to shew cause why the defendants should not be at liberty to pay the amount of the bill into court, to be paid to the plaintiffs when they should have given a satisfactory indemnity to the defendants, and why the plaintiffs should not pay to the defendants all their costs of the action, and why all further proceedings should not be stayed.

The plaintiffs opposed the making of the order, and the matter was referred by the master to a judge, who dismissed the summons, on the ground that, the plaintiffs opposing the order, he had no jurisdiction. Before the pleas were delivered, the plaintiffs offered to settle on the terms that the defendants should pay debt and costs, the plaintiffs giving an indemnity. The defendants declined to pay the plaintiffs' costs and claimed their costs from the plaintiffs.

After the defendants had pleaded, the plaintiffs took out a summons to strike out the second and third pleas (the pleas founded on the loss of the bill), on an indemnity being given by the plain-

tiffs to the defendants to the satisfaction of the Court or judge, or a master, against the claims of any other person upon the bill. The summons was heard before Master Gordon, who made an order in the terms prayed for, and refused to make it a term of the order, as asked by the defendants, that the plaintiffs should pay the defendants' costs, on the ground that the judge had before decided the question of costs on the hearing of the former summons.

An application was then made by the defendants by way of appeal, from the decision of Master Gordon to Byles, J., at chambers, to rescind or vary the order of Master Gordon, by directing that as the defendants had always been ready to pay on having an indemnity they should be at liberty to tax their costs of the action, and deduct the same from the debt, and that on payment of the balance all further proceedings should be stayed. The judge refused to make the order.

A rule nisi had been obtained to rescind the order of Master Gordon, on the ground that it enforced no stay of proceedings on the plaintiffs on payment by the defendants of the amount of the bill; or to vary the order by directing that the pleas should only be struck out on the terms that the defendants should be at liberty to tax their costs of the action, and of the said indemnity, and deduct the same from the debt, and that on payment of the balance all further proceedings should be stayed, but in default of such payment within three days after the said taxation, the plaintiffs to be at liberty to sign final judgment; or to restore the second and third pleas to the record.

Kemp shewed cause. The jurisdiction of the Court to give relief in cases of lost negotiable instruments is founded on the 87th section of the Common Law Procedure Act, 1854. But that section says nothing whatever about the costs of the action. There are other pleas on the record, so the striking out of the second and third pleas would not settle the action. The parties might go to trial on those pleas.

He cited *Aranguren* v. *Scholfield.* (1)

[WILLES, J. The reason of that decision was that the applica-

(1) 1 H. & N. 494.

1871

KING v. ZIMMERMAN.

tion for the indemnity was by the defendant not by the plaintiff. The defendant's remedy is not to make such application, but to plead the loss of the instrument.]

Harington supported the rule. He expressed his willingness to abandon the other pleas if the rule were made absolute to give the defendants their costs.

[He cited *Redmayne* v. *Burton*. (1)]

WILLES, J. I think this rule should be made absolute. The jurisdiction which we are now exercising is founded on the principles expressed by Lord Tenterden in the case of *Hansard* v. *Robinson*. (2) That was an action on a bill of exchange by the indorsee against the acceptor. The bill was lost by the indorsee after it became due, and he had offered an indemnity. The decision of the Queen's Bench was in favour of the defendant, but Lord Tenterden, after pointing out the reasons why at law the plaintiff could not recover without production of the bill, and the inconveniences which might be caused to the acceptor if it were otherwise, says: "Is the holder then without remedy? Not wholly so; he may tender sufficient indemnity to the acceptor, and if it be refused he may enforce payment thereupon in a court of equity." He then refers to similar provisions in the laws of other countries. Lord Tenterden distinctly says that there is no complete equity entitling the holder to relief unless and until he has tendered an indemnity to the party liable on the bill. If no tender of an indemnity were made before suit the plaintiff would certainly not obtain relief on such terms as to give him the costs of the suit.

The power has now been given to a court of law to do that which formerly a court of equity alone could do, by the 87th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. It is by that section enacted, "that in case of any action founded upon a bill of exchange or other negotiable instrument it shall be lawful for the Court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given, to the satisfaction of the Court, or judge, or a master, against the claims of any other person, upon such negotiable instrument."

(1) 2 L. T. (N.S.) 324. (2) 7 B. & C. 90.

It seems to me that the Court has jurisdiction under that section to deal with the costs. Their jurisdiction is substituted for that of the court of equity, to which it was formerly necessary to have recourse, and they are to determine what is a proper indemnity to be given according to the old practice in equity. The very expression " indemnity," would seem to include an indemnity against any loss or expense to which the defendant is or may be put by reason of the other party's having lost the instrument, the production of which is one of the legal elements on which his claim is founded.

In Story's Equity Jurisprudence § 86 (a), it is stated that in cases of lost negotiable instruments, an offer of indemnity must be made to entitle the plaintiff to relief, and " If the plaintiff be the party solely in fault in cases of this character, he will be compelled to pay defendant's costs of the suit as between attorney and client." The case of *Hopkins* v. *Adams* (1) is referred to as an authority for these propositions, which are, however, quite in accordance with the law as laid down in *Hansard* v. *Robinson* (2) by Lord Tenterden. The result is, that as the plaintiffs proceeded in this action without previously offering any indemnity, although the bill was lost, they must pay the defendants the costs which have been incurred through their default. I think, however, that the plaintiffs ought only to pay the costs up to the date of Master Gordon's order. The subsequent costs are to be considered as having been incurred in sustaining an order made in their favour, and therefore they ought not to be called on to pay them.

KEATING, J., concurred.

Rule absolute. (3)

Attorney for plaintiffs: *Angell.*

Attorneys for defendants: *Shaw & Fraser.*

(1) 20 Vt. 407.

(2) 7 B. & C. 90.

(3) The form of the order as ultimately made was that all proceedings should be stayed on defendants, within two days after taxation of defendants' costs up to the date of Master Gordon's order, paying the amount of the debt, less those costs, upon receiving personal indemnity from the plaintiffs against the claims of other persons on the bill; and if the defendants did not then pay, the plaintiffs should be at liberty to sign judgment for the balance of the debt.

1871
June 6.

VIGAR *v.* DUDMAN.

Tithes—Modus, Breach of—Conversion of Land into "Tillage,' what amounts to—Garden and Orchard Accessories to a House.

An award made under a private inclosure Act commuting the tithes of a parish, set out the terms of a modus, preserved by the Act, by which certain lands in the parish were exempted from the payment of tithes in kind. By the terms of the modus, as set out, the exemption ceased during such time as the lands or any part thereof might be converted into tillage. A field of about an acre, which was among the lands subject to the modus, was dealt with as follows: A house was built upon a portion of it, and a further portion, to the extent of twenty-two perches, was at the same time converted into a garden by the then owner, who fenced off the house and garden from the rest of the field, the remaining portion being used as an orchard:—

Held, that the manner in which the field had been dealt with, did not amount to a conversion of it, or any part of it, into "tillage."

Affirmed in Exch. 2 Q.B. 724 (1)

THIS was an action of replevin in the County Court of Somersetshire, removed by certiorari into this court, in which a special case was stated for the opinion of the Court.

The plaintiff was a farmer and landowner residing at Pitney, in the county of Somerset, and the defendant was the rector of the parish of Pitney. The action was brought to recover damages for a distress levied on the goods of the plaintiff for the sum of 3*l.* 16*s.* 3*d.*, being six years' arrears of a corn rent-charge alleged to be due to the defendant as for a broken modus. The tithes of the parish had been commuted before the passing of the Tithe Commutation Act for a corn rent-charge by an award made under the provisions of the General Inclosure Act, 41 Geo. 3, c. 109, and the Pitney Inclosure Act, 42 Geo. 3.

By his award the commissioner recited that the private Act preserved all existing moduses applying to lands in the parish, and stated that as the moduses applied only to the said lands when occupied by the owners thereof, or by persons residing within the said parish, and such lands were subject to the payment of tithes in kind to the rector when occupied by any person or persons not residing in the parish, or "converted into tillage;" he had inserted in a schedule to the award the tithe payments to be payable out of such lands during the time when the same lands, or any part

(1) Affirmed H.L. 6 H.L. 212

thereof, should be occupied by any person or persons not residing within the parish, or should be converted into tillage as aforesaid.

A certain field was mentioned in the schedule, the extent of which was there stated to be 1*a.* 3*r.* 3*p.*, and the modus payable in respect thereof was stated to be one penny; but the rent to be paid to the rector if the land should be converted into tillage was 12*s.* 8½*d.* That field was occupied by the plaintiff, who was absolute owner thereof. About forty years back a house was built upon a portion of the field, and a further portion, to the extent of twenty-two perches, was converted into garden ground by the then owner thereof, who fenced off the house and garden from the rest of the field, the remaining portion being orchard.

No claim was ever made on the plaintiff in respect of the land for payment of any other sum than the modus of one penny till October, 1869, when the plaintiff was called upon for payment of 3*l.* 16*s.* 3*d.*, being six years' arrears of the corn rent charged in the schedule, on the grounds that by reason of the said twenty-two perches of the field having been converted into garden, the whole sum of 12*s.* 8½*d.* was payable as if the whole field had been converted into tillage; and, also, that the planting of the ground as an orchard was a breach of the modus. The plaintiff refused to pay, and the defendant then distrained, and the plaintiff replevied. The Court were to be at liberty to draw inferences of fact. The question for the Court was, whether, under the above-mentioned circumstances, the plaintiff was entitled to recover in the action of replevin.

A. Charles, for the plaintiff. The question is whether the turning of part of this field into a garden, and part into an orchard, amounted to converting it into "tillage" within the meaning of the award. The plaintiff contends that it did not. The word "tillage," in its usual signification, refers to operations by which the soil is broken or turned up for ordinary agricultural purposes. In Latham's English Dictionary, the word "till" is stated to be commonly used of husbandry of the plough. In Webster's Dictionary "tillage" is defined to be the operation, practice, or art of preparing land for seed, and keeping the ground free from weeds that might impede the growth of crops.

Garden tithe and orchard tithe have always been treated as

1871

VIGAR v. DUDMAN.

different from ordinary tithe of agricultural lands. See 6 & 7 Wm. 4, c. 71, ss. 40, 42. A great number of ancient Acts of Parliament distinguish between "tillage, "pasture," and "orchard." See 7 Hen. 8, c. 1; 27 Hen. 8, c. 22: 5 & 6 Edw. 6, c. 5.

Secondly, even if devoting the land to the purposes of a market garden or orchard would be converting it into "tillage" within this award, that has not been done in the present case. The garden and the orchard are merely subsidiary to the house, and used in connection with it. The land is used for domestic as opposed to agricultural purposes. By the grant of a messuage or house the orchard, garden, and curtilage will pass: Co. Litt. 5 a.

[He also cited *Mascall* v. *Price* (1), *Bedingfield* v. *Freak.* (2)]

Philbrick (*E. Jones* with him), for the defendant. The only question is as to the meaning of the word "tillage" as used in the award. The ancient statutes cited afford no guide as to the meaning, for they were passed with a wholly different purview, their principal object being to prevent the too-extensive conversion of arable land into pasture. The fruit of an orchard is subject to tithes at common law. Looking, therefore, to the reason of the thing, it would probably be meant that the land should pay when converted into orchard as well as when converted into arable. If any part of the field be converted into tillage the modus is broken, and the tithe-rent becomes payable. The orchard cannot be a necessary accessory to the house.

WILLES, J. I am of opinion that our judgment should be for the plaintiff in this case. The award makes the plaintiff's land liable to a sum of one penny, except when occupied by a person not residing in the parish or converted into tillage. In the latter case a sum of 12*s.* 8*d.* is to be paid. The question is to which of these two sums the land was liable since the dealing with it set out in the case. At the time the house was built part of the field was turned into a garden, about twenty-two perches, not an excessive amount if the house was of any size, and the remainder of it appears to have been devoted to an orchard. Such a garden and orchard are ordinary accompaniments of a residence in the country; in this

(1) 1 Eag. & Young, 227.

(2) Cro. Eliz. 467: 1 Eag. & Young, 118; 2 Inst. 490; Rolle, 651, Co. Litt. 85 b

case they were made at the same time as the house, and until the present dispute arose the one penny only has been claimed. There are, therefore, strong reasons for supposing, if it be necessary to draw any inference of fact, that they were no more than the reasonable accessories of such a house as that now in question, and not to be classed amongst such gardens and orchards as might constitute an employment of the land for agricultural purposes. They are not, for example, like a market garden. Not only could that inference, I think, be fairly drawn, but also it appears to me that the land is primâ facie subject to the modus only, and the burthen of shewing the existence of the facts which would subject it to the larger charge lies on the rector. In the absence of proof to the contrary, we ought to assume that the garden and orchard were mere accessories of the house. It is clear that the building of a house with such accessories was not a conversion of the land into tillage: it was a use of the land merely as a residence, and for residential purposes. If I were asked to say what I thought to be the meaning of the word "tillage," I should say that it must be used in the ordinary sense in which the word was used at the time when the modus came to be expressed in the terms which were used in the award. I am disposed to think that that sense may be gathered from Lord Coke's note on the 117th section of Littleton, Co. Litt. 85 b, in which he eulogizes the practice of "agriculture or tillage." I am satisfied, looking to the expressions there used by Lord Coke, that he would not have thought the conversion of land into houses and gardens, such as those now in question, was "tillage" in the sense in which he used the word.

BYLES, J. I am of the same opinion. I think the word "tillage" is to be construed according to its popular and ordinary meaning at the time when it was employed. So construed, it applies to land used for agricultural, not for domestic and residential, purposes.

KEATING, J., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *Vizard & Co.*
Attorneys for defendant: *Lowless, Nelson, & Jones.*

1871
June 7.

CHAMBERLAIN *v.* KING.

False Imprisonment—Notice of Action—Act done in pursuance of Statute—Bonâ fide Belief—Reasonableness of—Larceny Act (24 & 25 *Vict. c.* 96) *s.* 103, 113.

A defendant in an action for false imprisonment is entitled to notice of action under the Larceny Act, s. 113, if he honestly believed in the existence of a state of things which, if it had existed, would have justified his doing the acts complained of under the statute. Some facts, therefore, must exist, such as might give rise to an honest belief; but it is not necessary that the belief should be reasonable.

Leete v. *Hart* (Law Rep. 3 C.P. 322) explained.

THIS was an appeal from the County Court of Kent, holden at Sheerness. The facts as stated in the case were in substance as follows:—The plaintiff was a waterman residing at Rochester, and the defendant was an officer in the Royal Artillery, stationed in garrison at Sheerness. The action, which was for false imprisonment, was tried before a jury. The plaintiff stated in his evidence that on the 19th of June, 1870, he saw a buoy in the river Medway which appeared to him to be nearly sunk, and having been previously told by the coxswain of the Sheerness garrison-boat that if he found any buoys or targets belonging to the War Department adrift, he would get salvage for bringing them ashore, he pulled the anchor to which the buoy was attached on board his boat, and towed the buoy ashore.

The defendant stated in his evidence that, looking out of the messroom through a powerful telescope, he saw the plaintiff in a boat approach the buoy, and, after being occupied several minutes, remove the buoy and the anchor, which were the property of the War Department, and that in the bonâ fide belief that the plaintiff was stealing the same he gave him into custody the same evening for stealing property of the War Department; also, that the coxswain of the garrison boat had no authority to give any such orders as the plaintiff had stated that he had given with regard to the buoys and targets, or to promise salvage for bringing them ashore, and that the plaintiff must have known this from the length of time he had been a waterman at Sheerness.

On the 22nd of June, the plaintiff was brought before the stipen-

diary magistrate at Sheerness, when the defendant stated that he did not wish to prosecute him, but that he hoped the arrest would prevent such things happening in future, as numerous complaints had been made to the defendant of the removal of buoys belonging to the War Department. It was contended, on behalf of the defendant, that he had, in giving the plaintiff into custody, acted under the provisions of the Consolidated Larceny Act (24 & 25 Vict. c. 96), and that he was entitled to notice of action under the statute; and ss. 103, 113 were especially relied on in support of the above contention.

It was contended on the part of the plaintiff, that under the authority of *Downing* v. *Capel* (1), as the plaintiff was not forthwith taken before a neighbouring justice of the peace, but was locked up for three days when there was no necessity for his being so, the defendant was not entitled to notice of action. It was further contended, on behalf of the defendant, that the right of the defendant to notice was a question for the judge, and not for the jury, and was not affected by the duration of the imprisonment, and that the question whether there was reasonable and probable cause for the arrest was also a question for the judge and not for the jury, and that there was, in fact, under the circumstances, reasonable and probable cause for the arrest.

The judge told the jury that under 24 & 25 Vict. c. 96, s. 103, any person might, without a warrant, apprehend any person found committing theft, and if acting in the bonâ fide belief that he had authority so to apprehend him, although no theft had been committed, he was entitled to notice of action before the commencement of any action against him for so doing, provided he had reasonable ground for believing that the person apprehended was committing a theft: that the first questions they would have to consider were, whether the defendant acted bonâ fide, and whether from what he saw the plaintiff doing, he might not reasonably suppose the plaintiff was stealing the buoy and anchor. If their conclusions upon these questions were in the affirmative, then the defendant was entitled to notice of action, and the plaintiff must be nonsuited. If, however, they were of opinion that the defendant did not act bonâ fide, or that from what the plain-

(1) Law Rep. 2 C. P. 461.

1871

CHAMBERLAIN v. KING.

tiff was seen doing he could not be reasonably supposed to be stealing the buoy and anchor, then the plaintiff would be entitled to a verdict for some amount, as the defendant had not complied with the provisions of the 103rd section of 24 & 25 Vict. c. 96, by taking the plaintiff forthwith before some neighbouring justice of the peace, previously to which enactment a private person could not justify apprehending a person without warrant upon mere suspicion of felony, unless it turned out that a felony had been actually committed.

The jury found that the defendant did not act bonâ fide, and that from what he saw the plaintiff doing he could not reasonably suppose the plaintiff was stealing the buoy and anchor; and assessed the damages at 15*l.*, whereupon a verdict for that amount was entered for the plaintiff.

The question for the Court was, whether the judge had rightly directed the jury. If the Court should be of opinion that the direction was right, the verdict was to stand; but if they were of the contrary opinion, then either a verdict for defendant or a nonsuit was to be entered, or a new trial to be ordered, as the Court might direct.

Archibald, for the defendant. The county court judge's direction to the jury was clearly contrary to the law as laid down in the cases of *Hermann* v. *Seneschal* (1), and *Roberts* v. *Orchard* (2). The proper question for the jury is, whether the defendant honestly and bonâ fide believed in the existence of a state of things that, if it had existed, would have afforded a justification under the statute. If he did, he was entitled to notice, whether such belief was reasonable or not. Reasonableness is only an ingredient in determining the existence of a bonâ fide belief.

[He also cited *Lister* v. *Perryman* (3); *Parton* v. *Williams* (4); *Reed* v. *Cowmeadow* (5).]

F. J. Smith, for the plaintiff. The defendant was entitled to notice of action if he bonâ fide believed that the plaintiff was committing an offence within the Act, but there must be some reason-

(1) 13 C. B. (N.S.) 392; 32 L. J. (C.P.) 43.
(2) 2 H. & C. 769; 33 L. J. (Ex.) 65.
(3) Law Rep. 4 H. L. 521.
(4) 3 B. & A. 330.
(5) 6 Ad. & E. 661.

able ground as a basis for belief. It is not sufficient if he acted on mere suspicion. A belief based on facts from which it is not reasonable to suppose that an offence is being committed is a mere suspicion: *Leete* v. *Hart* (1). There must be an honest belief in facts which, if they existed, would make it reasonable to suppose that the plaintiff was committing an offence within the statute. What the defendant saw was no reasonable ground for such a supposition. Taking the whole of the direction of the county court judge together, it was substantially correct. He left it to the jury to say whether the defendant acted bonâ fide, and they have found that he did not.

[KEATING, J. The objection to his ruling is, that he has made the reasonableness of the belief the test of the existence of a belief sufficient to entitle the defendant to the protection of the statute.]

[He also cited *Rudd* v. *Scott* (2); *Hughes* v. *Buckland* (3); *Hazeldine* v. *Grove* (4); *Wedge* v. *Berkeley* (5); *Downing* v. *Capel* (6).]

WILLES, J. I am of opinion that there must be a new trial in this case. Certainly it must be admitted that the county court judge might naturally have some difficulty in dealing with the authorities on this subject, for many of the earlier cases mix up the question whether a defendant was acting in pursuance of the Act, i.e., in the honest belief of a state of facts which would have entitled him, under the Act, to do as he did, and therefore was entitled to notice, with the question whether there was reasonable and probable cause for a prosecution. In the cases of *Rudd* v. *Scott* (2), *Wedge* v. *Berkeley* (5), and *Reed* v. *Cowmeadow* (7), it will be found that some such confusion prevailed; and in the case of *Hughes* v. *Buckland* (3), the necessity for reasonable grounds for belief in the person claiming the benefit of the Act seems to have been recognized by no less an authority than Lord Wensleydale. These cases were very probably brought before the county court

(1) Law Rep. 3 C. P. 322.
(2) 2 Scott, N. R. 631.
(3) 15 M. & W. 346.
(4) 3 Q. B. 997.
(5) 6 Ad. & E. 663.
(6) Law Rep. 2 C. P. 461.
(7) 6 Ad. & E. 661.

1871

CHAMBERLAIN v. KING.

judge, and he implied from them that it was a condition of the protection given under the Larceny Act, that the person claiming that protection should have had reasonable grounds for supposing that he was acting under circumstances in which the statute would entitle him to act. He accordingly left the case to the jury, with the direction that the defendant was entitled to notice of action if he acted in the bonâ fide belief that he had authority to apprehend the plaintiff, although no theft had in fact been committed, "provided he had reasonable ground for believing that the person apprehended was committing a theft;" and the jury found that the defendant could not reasonably suppose the plaintiff was stealing the buoy and anchor. The question, therefore, arises whether, if a person acts in the honest belief that the facts exist which would entitle him to act in pursuance of the statute, he is to be deprived of the protection given by the statute by the jury's choosing to find that there were no grounds on which they think it reasonable that he should entertain that belief. It is obvious that the jury never meant here to negative the defendant's belief altogether. There might be a case in which a person might act without any grounds for belief whatever, without the knowledge of any facts such as a belief might be based on. In such a case he would act on mere guesswork or suspicion, and without anything that could be called a belief at all. Here the case is not of that description. There was ground on which the defendant might honestly believe, and no doubt did believe, that the man was stealing the anchor. The law on this subject is quite settled by the decisions in *Hermann* v. *Seneschal* (1), and *Roberts* v. *Orchard* (2). According to those cases, the proper question for the jury is, whether the defendant honestly believed in the existence of a state of facts which, if it had existed, would have justified him in doing as he did, without reference to the reasonableness of such belief. It is clear that the direction of the county court judge was not in accordance with the law so laid down.

In the report of the case of *Leete* v. *Hart* (3), a semble is introduced into the headnote, that even an honest belief would be insufficient, unless the defendant had reasonable grounds for such

(1) 13 C. B. (N.S.) 392; 32 L. J. (C.P.) 43.

(2) 2 H. & C. 769; 33 L. J. (Ex.) 65.

(3) Law Rep. 3 C. P. 322.

belief; but the headnote of the reporter, as well as the judgments of the judges, must be taken with reference to the facts of that case. The decision in that case merely amounts to this: there must be facts on which a belief could be based. If it goes further it is in conflict with the decision of the Exchequer Chamber in *Roberts* v. *Orchard* (1). It is clear from the judgments that there was not the slightest intention on the part of the judges in any way to deviate from the law as laid down in that case.

1871

CHAMBERLAIN v. KING.

KEATING, J. I am of the same opinion. It is quite clear that the direction given by the county court judge to the jury was not in accordance with the law as laid down in *Hermann* v. *Seneschal* (2) and *Roberts* v. *Orchard.* (1) There was nothing inconsistent in the decision in *Leete* v. *Hart* (3) with the decisions in those cases. I was myself a member of the Court when *Leete* v. *Hart* (3) was decided, and it will be found that all the judges expressly disclaim any intention to deviate from the law as laid down in *Hermann* v. *Seneschal* (2) and *Roberts* v. *Orchard.* (1) The judgments of the Lord Chief Justice, my Brother Montague Smith, and myself, all distinctly proceed on the ground that there were no facts in that case on which to ground a belief at all. The judgment of my Brother Byles contains expressions upon which the semble inserted in the headnote was probably based; but his judgment, like the others in the case, must be read in relation to the facts of the particular case, without straining the effect of particular expressions; and it is obvious, that so read it is quite consistent in principle with the decisions in *Hermann* v. *Seneschal* (2) and *Roberts* v. *Orchard* (1).

Judgment for the defendant.

Attorneys for plaintiff: *Sandys & Knott, for Hayward.*
Attorney for defendant: *Clulow.*

(1) 2 H. & C. 769; 33 L. J. (Ex.) 65. (2) 13 C. B. (N.S.) 392; 32 L. J. (C.P.) 43.
(3) Law Rep. 3 C. P. 322.

1871
June 16.

HEMMING *v.* WILLIAMS.

Practice—County Court Appeal—Death of Respondent.

Judgment having been given for the defendant in an action of ejectment in the county court, the plaintiff appealed to a superior court. Before the hearing of the appeal the defendant died:—

Held, that the death of the defendant did not deprive the plaintiff of his right of appeal, and that the Court would proceed by analogy to the 166th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and would allow the plaintiff to proceed with the appeal after giving a notice similar to that required by that section.

THIS was an appeal from the County Court of Gloucestershire.

The action was one of ejectment. The defendant occupied the premises as tenant; but his landlady did not appear and defend the action. The plaintiff tendered as evidence of his title at the trial, two deeds, which were objected to on behalf of the defendant as being insufficiently stamped. The county court judge was of opinion that the stamps were insufficient, and rejected the deeds, and judgment was thereupon entered for the defendant.

The plaintiff appealed from this decision to the Court of Common Pleas, but before the hearing of the case on appeal, the defendant died. When the case came on for argument (June 7th)—

Finlay, instructed by the defendant's attorney, informed the Court of the fact of the defendant's death, and that there were no personal representatives of the deceased.

Waddy, for the plaintiff, contended that the death of the defendant could not deprive the plaintiff of his right of appeal. He cited the 242nd and 248th County Court Rules of 1867.

The Court were of opinion that the plaintiff could not be deprived of his remedy by the accident of the defendant's death, and that they should proceed by analogy to the 166th section of the Common Law Procedure Act, 1852. (1)

(1) The 166th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76) enacts as follows:—

"In case of the death of a sole defendant, or of all the defendants in error, the plaintiff in error may proceed upon giving ten days' notice of the proceedings in error, and of his intention

1871

HEMMING v. WILLIAMS.

They therefore decided that the case should stand over, in order that the plaintiff might give notice of his intention to proceed, to the relatives of the deceased, or any parties really interested in the proceedings, and that on the Court's being informed by affidavit that such notice had been given, they would then hear the plaintiff's counsel in support of the appeal.

June 16. *Waddy* appeared for the plaintiff, and stated that he had an affidavit shewing that there were no personal representatives of the deceased, and that notice had been served on the widow of the defendant, on the landlady, and on the defendant's attorney. No one then appearing to argue on the other side, the Court directed the plaintiff's counsel to proceed with his argument, and after hearing such argument, gave judgment for the plaintiff, directing a new trial.

Judgment for the plaintiff.

Attorney for plaintiff: *T. H. Smith.*

ALLEN, APPELLANT; TUNBRIDGE, RESPONDENT.

June 6.

Hackney-Carriage—Railway-Station—"Plying for Hire"—Metropolitan Public Carriage Act, 1869 (32 & 33 *Vict.* c. 115), s. 4.

A brougham, the owner of which, by agreement with a railway company, attends at their station to await the arrival of trains for the conveyance of any passenger by the railway who chooses to hire it, and whose driver solicits passengers, is a "hackney-carriage plying for hire" within the meaning of s. 4 of the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115).

Clarke v. *Stanford* (Law Rep. 6 Q. B. 357), followed.

CASE stated by the Lord Mayor of London for the opinion of the Court, under 20 & 21 Vict. c. 43.

Upon the hearing of an information preferred by the appellant, an inspector of the Metropolitan police, against the respondent, charging that he, on the 23rd of June, 1870, was the owner and

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to continue the same, to the representatives of the deceased defendants, or if no such notice can be given, then by leave of the Court or a judge, upon giving such notice to the parties interested, as he or they may direct."

1871

ALLEN v. TUNBRIDGE.

driver of an unlicensed hackney-carriage which unlawfully plied for hire at the Cannon Street railway station, contrary to the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115), s. 7, the same was dismissed.

It was proved or admitted that the respondent was the owner of a four-wheeled carriage of the class usually called "broughams," which carriage he, dressed after the manner of a private coachman, himself drove; that the respondent's carriage had no distinguishing mark or numbered plate such as licensed hackney-carriages ought to have, and presented the appearance of a private carriage; that the South Eastern Railway Company allowed the proprietors of certain carriages, both of the class known as "cabs" and of the class usually called "broughams," the right or privilege of coming into the railway station at Cannon Street, and of standing such cabs and broughams by the arrival platform in the interior of such station for the purpose of being hired, the said station in Cannon Street (where the alleged offence is stated to have been committed) being the property of the South Eastern Railway Company, to which the general public have no right of access except when arriving or departing as passengers by the railway; that the respondent, being allowed such privilege from the company, on the day in question placed or stood his brougham alongside the arrival-platform in the interior of the station, and spoke to two several passengers who had arrived by train, his object being to get his carriage hired, but that neither passenger engaged him; and that the railway company so allowed the respondent to stand his carriage in their station, for the purpose of accommodating some of their passengers who desired a better class of carriage than those known as "cabs."

It was contended for the appellant that the respondent's carriage was a hackney-carriage within the meaning of the statutes; that there was a "plying for hire" within s. 7 of 32 & 33 Vict. c. 115, although the plying for hire was within the railway station; that the definition of a hackney-carriage given by s. 4 of 32 & 33 Vict. c. 115 is, that it is "a carriage for the conveyance of passengers, which plies for hire within the limits of the Act," without adding, as in the definition given in the same section of a stage-carriage, "in any public street, road, or place;" that, the statute

having been passed subsequently to the decision of the Court of Exchequer in *Case* v. *Storey* (1), the legislature must be presumed to have intentionally omitted the words, "in any public street, road, or place," from the definition of a hackney-carriage in consequence of that decision; and that, if it was necessary for the appellant, in order to support the information, to prove that the respondent's carriage was plying in a public place, the railway station was such a public place within the meaning of the Act.

For the respondent it was contended that the respondent's carriage was not a "hackney-carriage" within the meaning of the statutes; that the Hackney Carriage Acts do not extend to a railway station, which is private property; and that there was no "plying for hire" within the terms of s. 7 of 32 & 33 Vict. c. 115.

The Lord Mayor was of opinion that the contention of the respondent was the correct one; that the evidence and admissions did not shew that any offence had been committed; and that according to the judgment in *Case* v. *Storey* (1),—there being no interpretation-clause in the statute,—the words "plying for hire" could not apply to a standing or plying for hire under the circumstances of this case.

The opinion of the Court was requested as to whether the respondent ought to have been convicted.

F. M. White, for the appellant. The respondent's brougham was clearly a hackney-carriage, and he was "plying for hire" within the meaning of 32 & 33 Vict. c. 115, ss. 4, 7. The point was expressly decided by the Court of Queen's Bench in *Clarke* v. *Stanford* (2), where it was held that a carriage, whilst on the premises of a railway company under a contract with them to await the arrival of their trains, for the conveyance of any passenger by railway who chooses to hire it, is plying for hire within the meaning of the Act. *Case* v. *Storey* (1), which, however, turned upon an earlier statute (3), was there referred to. The facts of the present case are even stronger than those of that case.

Field, Q.C. (*Willis* with him), for the respondent. Looking at the whole tenor of the Act now in question, this is not a hackney-

(1) Law Rep. 4 Ex. 319. (2) Law Rep. 6 Q. B. 357.
(3) 1 & 2 Wm. 4, c. 22.

1871

ALLEN v. TUNBRIDGE.

carriage within it, nor was the respondent plying for hire in any public place. There is no difference in principle between this case and a hiring upon the premises of a job-master. The recent statute never could have intended by implication to alter the definition of a plying for hire under the former Act, as construed by the Court of Exchequer in *Case* v. *Storey*. (1) It was clearly meant to apply to carriages plying for hire in the street, under circumstances which made it compulsory on them to take any fare that might be offered them. The judgment of the Lord Chief Baron is extremely strong.

White, in reply. That which was done here would, if done in a public street, clearly have been a plying for hire, which means soliciting custom without any previous contract. After the decision in *Case* v. *Storey* (1), it cannot be contended that a railway-station is a "public street or place:" but the recent statute applies to a plying for hire in any place within the limits of "the metropolitan police district and the city of London and liberties thereof." [The cases of *Re Painter* (2), and *Bocking* v. *Jones* (3) were also referred to.]

WILLES, J. Without saying what my opinion would have been but for the recent case in the Court of Queen's Bench, I feel much impressed with the importance of having concurrent decisions upon the construction of Acts of Parliament; and I therefore come to the conclusion that the appellant in this case is entitled to judgment. *Clarke* v. *Stanford* (4) is precisely in point; and indeed there are some circumstances in this case which give even greater reason for holding that there was a plying for hire here than there. It was assumed in that case that the words "in any public street, road, or place" were omitted from s. 4 of 32 & 33 Vict. c. 115 by reason of the decision in *Case* v. *Storey* (1) that those words did not include a railway-station. A cab does not become any other than a hackney-carriage though plying for hire in a railway-station. I do not wish to throw any doubt upon the decision of the Court of Queen's Bench; but, if the matter were new, it might be worth while to consider whether a hackney-carriage might not

(1) Law Rep. 4 Ex. 319.
(2) 2 C. B. (N.S.) 702.
(3) Ante, p. 29.
(4) Law Rep. 6 Q. B. 357.

be a stage-carriage if passengers were carried at separate fares, and so brought by implication within the earlier part of s. 4 of the Act. But I do not feel the necessity for that implication here. I rather incline to follow authority. It must, I think, be taken that the vehicle in this case, if it had been a cab, would have been a hackney-carriage within s. 4. As to plying for hire, this is a stronger case than that in the Queen's Bench. There, without expressing it in words, the man was understood to be ready to be hired by any passenger coming by the trains. Here, there was an actual solicitation of two persons to hire the carriage. Founding my judgment entirely upon the case in the Queen's Bench, I am of opinion that the respondent ought to have been convicted.

KEATING, J., concurred.

MONTAGUE SMITH, J. I am of the same opinion upon the authority of the case in the Queen's Bench. It appears to have been held there, that, if the proprietor of a carriage sends it to a place for the purpose of picking up passengers, that is a plying for hire within the Act. That is very different from a customer going to a job-master to hire a carriage. I rest my judgment also entirely upon the case of *Clarke* v. *Stanford*. (1)

Judgment for the appellant.

Attorneys for appellant: *Ellis & Ellis.*
Attorney for respondent: *Cearns.*

(1) Law Rep. 6 Q. B. 357.

Applied. BASMA *v.* WEEKES. [1950] 2 All E.R. 146.

Applied. BASMA *v.* WEEKES [illegible]

1871
June 16.

[IN THE EXCHEQUER CHAMBER.]

CALDER AND ANOTHER *v.* DOBELL.

Principal and Agent—Contract with Broker when Principal disclosed—Parol Evidence—Election.

C., a broker, was authorized by the defendant to buy cotton for him, but not to disclose his name. C.'s credit not being good enough to enable him to obtain a contract upon his own sole responsibility, he gave the plaintiffs the name of his principal, and bought and sold-notes were exchanged between the plaintiffs and C., in which the latter was named as the buyer. C. sent the defendant an advice-note informing him that he had bought the cotton of the plaintiffs "for him," and the defendant did not repudiate the transaction. An invoice was made out to C., and, the market falling, C. was called upon by the plaintiffs to accept and pay for the cotton, and threatened with legal proceedings. Failing to obtain payment from C., the plaintiffs sued the defendant:—

Held, that the fact of the defendant's name being disclosed at the time of the contract did not preclude the plaintiffs from having recourse to him; that parol evidence of the circumstances under which the contract was made was admissible; and that the insertion of C.'s name in the contract, though his principal was known at the time, and the subsequent demands upon C. for payment, did not necessarily amount to an election on the part of the plaintiffs to give credit to C., and to him only.

Judgment affirmed in the Exchequer Chamber.

ACTION for not accepting cotton pursuant to contract. The cause was tried before Brett, J., at the last assizes at Liverpool. The facts were as follows:—

The plaintiffs were cotton-brokers in Liverpool trading under the name of Wright & Co. The defendant was a merchant there. In January, 1870, one Cherry, a broker, proposed to the defendant to buy cotton "to arrive." The defendant consented to buy 100 bales, but declined to allow his name to appear in the transaction. Cherry thereupon offered to buy of the plaintiffs 100 bales, but they refused to trust him, and Cherry, being pressed, disclosed the name of the defendant as his principal. A contract was then entered into between the plaintiffs and Cherry for the sale of 100 bales at a given price, and a sold-note was sent by the plaintiffs to Cherry,—"Mr. P. Cherry. We have this day sold to you 100 bales cotton," &c., &c., and a bought-note was sent by Cherry to the plaintiffs,—"I have this day bought of you 100 bales cotton," &c.,

&c. Cherry at the same time sent the defendant an advice-note, as follows:—"I have this day bought for you from Wright & Co. 100 bales cotton," &c. This note was kept by the defendant till the month of August. An invoice was sent by the plaintiffs to Cherry charging him as the buyer of the cotton, and Cherry was debited for it in the plaintiffs' books, and, after the arrival of the cotton, he was repeatedly applied to to accept and pay for it, both by the plaintiffs and by their attorneys; and, failing to obtain payment from him, and the market falling, the plaintiffs sold the cotton and sued the defendant for the difference between the price at which the cotton was sold and the market-price at the time of the breach.

The learned judge left the following questions to the jury:—1. Did the defendant authorize Cherry to make the contract for him? 2. Did Cherry assume to make the contract for the defendant, and did the defendant, knowing this, ratify his act? 3. Did the plaintiffs, knowing that Cherry was acting as agent for the defendant, elect to contract with Cherry as principal, upon the terms of giving credit to him and him alone?

The jury answered the first and second questions in the affirmative, and the third in the negative, and a verdict was thereupon entered for the plaintiffs for 530*l.*, leave being reserved to the defendant to move to enter a verdict for him or a nonsuit, if, assuming the facts found by the jury to be true, they could not properly be given in evidence, having regard to the written contract; or if, having regard to the whole evidence, the learned judge ought to have directed the jury, as matter of law, to find for the defendant.

Jan. 12. *Holker, Q.C.* (*Herschell* with him), moved to enter a verdict for the defendant, or a nonsuit, pursuant to the leave reserved, or for a new trial on the grounds of misdirection and that the verdict was against the weight of evidence. Dobell's name having been disclosed at the time, it was not competent to the plaintiffs to say they contracted with him, and not with Cherry. Where the name of the principal is not disclosed, parol evidence is admissible to shew that there was a principal. But, where the principal is known at the time, and the seller chooses to contract with the agent in his own name only, to allow the seller to say

1871

CALDER v. DOBELL.

that he contracted with the principal, and not with the agent, would be to admit parol evidence to contradict the written contract.

[BOVILL, C.J. Have you any authority to support that distinction?]

There is no distinct authority upon the subject; but it is submitted that it must be so in principle.

[MONTAGUE SMITH, J. It is opposed to the doctrine of Parke, B., in *Higgins* v. *Senior*. (1)

BRETT, J. There is nothing in the notes to *Thomson* v. *Davenport* (2) to warrant it; and the reasoning of all the cases is against it.]

The insertion of the agent's name in the contract, the principal being known at the time, was a conclusive election on the sellers' part to look to the agent only; and the learned judge ought to have so directed the jury, as matter of law. In *Paterson* v. *Gandasequi* (3), Lord Ellenborough says:—"The Court have not the least doubt that if it distinctly appeared that the defendant was the person for whose use and on whose account the goods were bought, and that the plaintiffs knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action." And in *Thomson* v. *Davenport* (4), Lord Tenterden says:—"I take it to be a general rule that, if a person sells goods, supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison* v. *Gandasequi* (5) and *Paterson* v. *Gandasequi* (6), the

(1) 8 M. & W. 834.
(2) 2 Sm. L. C. 6th ed. 338.
(3) 15 East, 62, 68.
(4) 9 B. & C. 78, 86.
(5) 4 Taunt. 574.
(6) 15 East, 62.

seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." If this were not so, it would be to make two persons severally liable upon the same contract at the same time, which the law does not allow: *Priestly* v. *Fernie.* (1) The seller is bound to make his election at the time: *Smethurst* v. *Mitchell* (2); and see Addison on Contracts, 6th ed., p. 605. Knowing the name of the principal at the time, and having chosen so to act as to make the agent alone responsible, the plaintiffs conclusively made their election to charge Cherry; and the learned judge should have so directed the jury; or, at all events, they should have been told that, if the plaintiffs intended to hold the principal liable, they should have manifested their intention within a reasonable time.

[WILLES, J. This last point does not appear to have been raised at the trial.]

The verdict was clearly against the weight of evidence.

BOVILL, C.J. The jury having found a verdict for the plaintiffs, my Brother Brett reserved leave to the defendant to move to enter a nonsuit or a verdict for him, if, assuming the facts found by the jury to be true, they could not properly be given in evidence, having regard to the written contract; or if, having regard to the whole evidence, the jury ought to have been directed as matter of law to find for the defendant.

The first ground upon which Mr. Holker has moved to enter a verdict for the defendant is founded on the first part of the leave. For this purpose the facts found must be taken to be true; and the question is whether parol evidence was admissible to shew that the contract was made on behalf of the defendant as principal. Now, the written contract was made with Cherry in his own name; and it is contended that, the defendant's name having been disclosed at the time, the defendant cannot be sued; in other words, that parol evidence was not admissible to shew that the defendant was the real principal. It has for many years been a generally received impression that, where a broker makes a contract for an

(1) 3 H. & C. 977; 34 L. J. (Ex.) 172.

(2) 1 E. & E. 623; 28 L. J. (Q.B.) 241.

1871

CALDER v. DOBELL.

undisclosed principal, the latter may sue upon it, and equally that, when discovered, he may be made responsible for its performance. There can be no doubt that the defendant might have sued upon the contract so made by Cherry; and I am equally of opinion that he may be made responsible, provided the parol evidence was admissible to shew that he was the real principal. The rule is clearly laid down by Parke, B., in *Higgins* v. *Senior* (1), in the following terms:—"There is no doubt that, where such an agreement is made, it is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to and charge with liability on the other the unnamed principals" (unnamed principals there meaning principals not named in the contract itself), "and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom on the face of it it purports to bind; but shews that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is in law the act of the principal." The principal may sign by the hand of another in his own name, or in a fictitious name, or by means of a stamp, and so become a party to the contract in various ways. The ground upon which this doctrine rests is explained also by Parke, B., in *Beckham* v. *Drake* (2), where, dealing with a similar matter, he says: "The doctrine rests upon this principle, that the act of the agent was the act of the principal, and the subscription of the agent was the subscription of the principal." And he proceeds to say, "I am not aware of the existence of any cases in which a distinction has been suggested between a contract which has been entered into by one individual for another, or by two individuals for themselves and another, as to the liability of the principal to be sued." He then refers to the case of a bill of exchange, which he treats as an exception, standing upon the law-merchant. The same principle is exemplified by the Court of Queen's Bench in the case of *Trueman* v. *Loder*. (3) There the agent was acting for a foreign house, and the Court say: "If the defendant chose to appoint an agent to carry on trade for

(1) 8 M. & W. 834, 844.

(2) 9 M. & W. 79, 96.

(3) 11 Ad. & E. 589.

him in the name of Higginbotham, he clearly authorized that person to do all that would be necessary for him so to carry it on; among other things, to employ a broker to sell for him; and it does not lie in his mouth to deny that the name of Higginbotham so inserted by the broker in the sold-note is the defendant's own name of business." There are other observations to the same effect, and it is held that the evidence is admissible, and that the signature is the authorized signature of the principal. The evidence does not contradict the written contract. It is true, as has been said, that the agent may be personally charged, and that where he has given his signature to the contract, he is estopped from saying that he did not contract personally. That, however, is a very different thing from saying that the real principal when discovered cannot sue or be sued. The suppression of the principal's name is entirely consistent with the practice of many trades, to conceal transactions of speculation. The effect is that if the broker enters into contracts in his own name, and has a principal, those whom he contracts with will have the responsibility both of the principal and of the broker. There is nothing inconsistent in thus giving an option to hold either responsible. I am of opinion that, in accordance with all the authorities, the parol evidence was admissible.

The next point is raised upon the latter part of the leave reserved. It seems to me to be impossible to say, as matter of law, that the learned judge was bound to direct the jury to find for the defendant. There was evidence which could not have been withdrawn from the jury. I am, therefore, of opinion that that ground for the motion fails.

Then it is said that the plaintiffs had elected to treat Cherry as the principal. For the purpose of this point we must assume that there was a principal who authorized Cherry to make the contract. Now, it is contended that the very fact of the plaintiffs' entering into the contract with Cherry was evidence of election. But, if the parol evidence was admissible, that argument fails. Election must be a matter of fact; and it appears that, at the time of entering into the contract, the plaintiffs expressly refused to trust Cherry. The next ground of alleged election was the demand of payment made on the broker. That, however, was an equivocal act. If the plaintiffs have got the responsibility of a principal, the demands

1871

CALDER v. DOBELL.

made upon the agent may have been made upon him on behalf of his principal. There are many trades in which the practice prevails of referring to the brokers alone; and it is a very convenient practice. Where shipping documents have to be tendered, they are almost invariably sent to the brokers for that purpose. I think the evidence relied on to shew an election was extremely slight, especially where the only action brought was brought against the principal. It was clearly for the jury, and the learned judge would not have been justified in withdrawing it from them. The jury, as men of business, have arrived at a conclusion upon it of which I see no reason to complain; and my Brother Brett does not report to us that he is dissatisfied with the verdict.

Then it was said that there was no evidence of authority in Cherry to make the contract in the form in which he made it. That rests entirely upon the evidence of the defendant himself; Cherry was not called. It was proved that advice was sent by Cherry to the defendant of a contract with Messrs. Wright & Co. for 100 bales of cotton, and there was also evidence that Cherry had authority to make that contract, and evidence of ratification by the defendant; and the jury found that the defendant did authorize and did ratify the contract so made, and my Brother Brett is not dissatisfied with that finding. It was further objected that the learned judge was wrong in leaving it to the jury to say whether the plaintiffs elected to treat Cherry as principal, and to give credit to him, and him only. That, however, was in favour of the defendant. I think it was not, as matter of law, a contract made with Cherry alone, and that the jury were well warranted in finding as they did. It was further contended that my Brother Brett should have told the jury that the plaintiffs were bound to make their election at once, or, at all events, in a reasonable time. That point was not and could not have been raised at the trial. For the purpose of this question all the rest must have been assumed against the defendant. I further think that there is no ground for saying that the verdict was against the weight of evidence. There will, therefore, be no rule.

WILLES, J. I am of the same opinion. When it is borne in mind that there is no difference, except when introduced by Act

of Parliament, beteenw a contract by word of mouth and a contract in writing not under seal, the whole argument must fail. The contention on the part of the defendant is founded upon the fact of there being a contract in writing, and on that part of it which contains the name of the agent. Consider how the matter would have stood if what passed between the plaintiffs and Cherry had been all without writing. It would have stood thus:—Dobell authorized Cherry to buy cotton for him. Cherry proposes to buy cotton of the plaintiffs; but, being told that the sellers do not choose to rely on his credit, he named Dobell as his principal. The plaintiffs thereupon sell to Dobell through Cherry as his agent. Upon that state of things, Dobell would alone have been liable, and not the agent. Superadd to this that, at the time of entering into the contract, the sellers had said to Cherry, "We insist upon having the liability of you, Cherry, just as if you were dealing with us without disclosing the name of your principal;" and suppose Cherry had assented to that. In that case, Dobell would have been liable to the plaintiffs as the principal buyer, and Cherry would also have been liable because he had agreed that he should stand in the same situation as if he had bought as broker for an undisclosed principal. The result would have been that the sellers would have had a right to elect to sue either the agent or the principal. Now, what was the effect of the writing here? A bought-note is handed to the sellers, in which Cherry's name only is mentioned, but which did not preclude the sellers from shewing that Cherry had a principal. That had the effect of making the principal answerable, assuming that his name had not been disclosed at the time; and it had the further superadded effect of making the agent liable, by reason of the peculiar character of the writing, by which he undertook to be liable as if the name of his principal had not been disclosed. This is the sole effect of *Higgins* v. *Senior*. (1) The case does not stand barely on that. There is another writing, viz. the advice-note which was handed to Dobell, and which ran thus:—"I have this day bought for you from Messrs. Wright & Co.," &c. These bought and sold-notes very often vary, as in *Cropper* v. *Cook* (2), and yet form part of the same transaction. It would be a remarkable

(1) 8 M. & W. 834.

(2) Law Rep. 3 C. P. 194.

1871

CALDER v. DOBELL.

contract if the buyer could sue the sellers upon it, and yet the sellers be precluded from suing the buyer. The result is that the defendant must shew that his liability was put an end to by the election. That is what Lord Tenterden meant when he said in *Thomson* v. *Davenport* (1) that, "if at the time of the sale the seller know not only that the person who is nominally dealing with him is not principal, but agent, and also know who the principal really is, and notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him alone, then, according to *Addison* v. *Gandasequi* (2) and *Paterson* v. *Gandasequi* (3), the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other." I do not agree with Mr. Holker that two persons cannot be severally liable on the same contract. The question is whether there was anything in the circumstances of this case to negative or exclude the liability of both principal and agent, or to substitute the liability of the latter for that of the former. The facts were properly submitted to the jury; and they have come to a conclusion upon them to which it was competent to them to come. There is nothing to prevent the seller from insisting upon having both principal and agent liable to him at the same time, with the additional advantage of knowing the principal's name at the time. The very object of the plaintiffs' insisting upon being informed of the name of the principal was to make him liable; and Cherry's name was inserted in the contract for the purpose of enabling them to charge him, at their option. To hold that asking the name of the principal at the time is to discharge the principal, would seem to me to be contrary to common sense. Several cases were referred to in the course of the argument; but the only one to which I desire to call attention, and which has a close resemblance to the present case, is *Mortimer* v. *M'Callan*. (4) I do not refer to that case for the usages of the Stock Exchange, which are subject to change. The decision proceeded on a usage of that market which involved circumstances very like those of the present case. There, one

(1) 9 B. & C. 78.
(2) 4 Taunt. 574.
(3) 15 East, 62.
(4) 6 M. & W. 58.

Taylor, a stock-broker, had applied to the plaintiff, a stock-jobber, for the purchase of 5000*l.* stock for the defendant. The plaintiff, not having any stock of his own, applied to Ward, who agreed to transfer, and did accordingly transfer, stock standing in his name to the defendant. Evidence was given that it was the usage on the Stock Exchange to give credit to the broker, even although the principal were disclosed, though credit is sometimes given to the principal, and his cheque taken when the broker's credit is not thought sufficient. The judge in summing up told the jury that, although by the regulations of the Stock Exchange the broker was the party considered liable, it did not follow that the principal might not be liable also; and he left it to them to say whether the plaintiff had ever given credit to or taken the responsibility of Taylor, or ever consented to release the defendant as the principal. The Court held this to be a proper direction; and, the jury having found that the plaintiff had not released the principal, the verdict was upheld. Lord Abinger, who was eminently experienced as to what is the proper question to be left to the jury in a case of this sort, there says: (1) "I do not apprehend the rules of the Stock Exchange would make any difference as to the right of a party who sells stock to choose to what person credit shall be given, if he thinks proper; and the evidence shews that it was the case sometimes to look to the principal. That, then, brings it to a question in this particular case whether or not the plaintiff meant to take the credit of Taylor only, and give up that of the defendant, or whether he insisted on the credit of the defendant. Now, that was a question for the jury." It is enough to say that it never seems to have occurred to the minds of the counsel or of the Court that the mention of the name of the principal at the time made any difference as to the liability of either principal or agent. I would conclude by saying that, but for the law laid down in *Higgins* v. *Senior* (2), Dobell, the principal, only would have been liable here; and that case only goes to superadd the liability of the agent, and not to detract from the liability of the principal. Apart from the written contract, the principal only would have been liable; and the clear effect of the writing was only to superadd the liability of Cherry, the agent.

(1) 6 M. & W. at p. 66. (2) 8 M. & W. 834.

1871

CALDER v. DOBELL.

MONTAGUE SMITH, J. I am of the same opinion. The written contract made by the plaintiffs with Cherry upon the face of it purports to be his contract, and his contract alone; and the first question is, whether parol evidence was admissible to shew that he was contracting for a principal. It is not denied that such evidence might be received if the principal had not been disclosed at the time; but it was strenuously contended that it cannot be received where the principal is known. I must confess I do not see any principle upon which the supposed distinction can rest. The rule is that evidence is admissible to shew that the person contracting was acting for a principal, because the admission of such evidence does not contradict the written contract. It is so put by Parke, B., in *Higgins* v. *Senior*. (1) "This evidence," he says, "in no way contradicts the written agreement. It does not deny that it is binding on those whom on the face of it it purports to bind; but shews that it also binds another, by reason that the act of the agent in signing the agreement in pursuance of his authority, is in law the act of his principal." The evidence is admissible on this principle, viz. that, for the purpose of that contract, the principal has allowed the agent to sign it in his own name in the place of himself. It has been held, no doubt, that evidence is not admissible to shew that the person named as the contracting party is not liable; and in that case Parke, B., says (2): "But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done." I have felt some doubt as to the soundness of that distinction. However, it has been followed in a great number of cases, and is now well established; and, although technical, it appears to consist with the practical business habits of mankind. Whether strictly logical or not, it is recognized by the law. The other principle, which is well laid down and is perfectly intelligible, viz. that parol evidence may be given to shew that the signature, though by an agent, is intended to bind his principal, is quite sufficient to dispose of this case, unless the distinction suggested by Mr. Holker is well founded. I cannot find ground for any such distinction, so far as

(1) 8 M. & W. 834, 844. (2) 8 M. & W. at p. 844.

the admissibility of evidence is concerned. The second question is whether the plaintiffs, knowing at the time of the making of the contract, that there was a principal, and also who that principal was, did not by the form of the contract elect to treat Cherry as the principal and the only principal. That is the point which seems to me to require the most consideration. Mr. Holker was bound to contend that the entering into the contract with Cherry in his own name, was, under the circumstances, conclusive evidence that the plaintiffs had elected to treat Cherry alone as the principal. I agree that it was strong evidence; but, if the parol evidence was admissible, it shews what the real transaction between the parties was. Being employed to buy cotton for the defendant, with an injunction not to allow the defendant's name to appear, Cherry buys in his own name; but the sellers, for reasons of their own, insisting upon knowing who the principal was, Cherry, disregarding his instructions in that respect, disclosed the defendant's name. The plaintiffs required the principal's name, with a view of fixing him; but, because he desired that his name should not appear, the contract was made out in the name of the agent. The plaintiffs clearly never intended to make the bargain with Cherry alone. At all events, it was a question for the jury; and it is impossible to say that it could have been properly withdrawn from them. Mr. Holker contended that the election was made, and conclusively made, at the time of the contract. The cases shew that the seller may make his election whenever the principal is discovered; and the only difference in principle between the case where the principal is disclosed and where he is not disclosed, is, that, in the former case, the election may be made at the very time the contract is made. If there were any estoppel, there might be some force in Mr. Holker's argument; but, when we come to a question of evidence, the argument fails. The only other question is as to the mode in which the questions were put to the jury. I think, however, they were put in a perfectly intelligible manner, and that the finding of the jury was well warranted by the evidence.

BRETT, J. The first point made by Mr. Holker was, that parol evidence that Cherry was acting as agent for the defendant ought

1871

CALDER v. DOBELL.

not to have been received, because the existence of a principal and his name were known at the time the contract was entered into, and therefore the parol evidence would contradict the written document. Where the principal is undisclosed, it is conceded that parol evidence that there is a principal is admissible, inasmuch as that does not contradict the written contract. I cannot follow the distinction. I see no reasoning to support it. It was further urged that, inasmuch as by the written contract, the agent was made liable, by election, the principal could not be liable also, because that would be making two persons severally liable upon the same contract at the same time. This argument would be equally applicable to a case where the principal is undisclosed; and there, though from the time the contract is made the agent is liable, the principal also is liable. If Mr. Holker's major proposition is incorrect, there is no more reason why the minor should be sustainable. As to the point of nonsuit, it is said that I ought to have told the jury, as matter of law, that the plaintiffs, by the insertion of Cherry's name in the contract, conclusively elected to treat him and him alone as the buyer. If, however, the first point fails, this also must fail. It must be a question of fact upon the whole evidence, and I could not withdraw it from the jury. Mr. Holker finds fault with all the questions I left to the jury. As to the first and second, they were mere matters of form. There was abundant evidence that Cherry did make the contract with the authority of the defendant, and that he did ratify it; for, the advice-note being sent to him, he kept it for five months without objection. The jury, therefore, were well warranted in answering both those questions affirmatively. As to the question of election, I left that question to the jury, having *Thomson* v. *Davenport* (1) before me; and the jury, with their knowledge of Liverpool business, were perfectly well qualified to deal with that; and I cannot say that they came to a wrong conclusion.

Rule refused.

Against this judgment an appeal was brought in the Exchequer Chamber, and the case was argued on the 16th of June before

(1) 9 B. & C. 78.

Kelly, C.B., Martin, B., Blackburn, J., Channell, B., Lush, J., Hannen, J., and Cleasby, B.

June 16. *Holker, Q.C.* (*Herschell* with him), for the defendant, contended as he had contended in the Court below, that the learned judge ought upon the facts proved to have directed the jury as matter of law to find for the defendant; that there was no evidence that the defendant authorized Cherry to make the contract sued on with the plaintiffs on the defendant's behalf, so as to entitle the plaintiffs to sue the defendant upon it; that there was no evidence that the defendant, with a knowledge that Cherry had assumed to make the contract on his behalf, ratified his act; that the evidence of what passed between Cherry and the plaintiffs at the time the contract was entered into, was inadmissible; and that the plaintiffs having, with a knowledge that the defendant was the alleged principal, entered into the contract with Cherry so as to charge him, could not afterwards charge the defendant, they having conclusively elected to charge the agent. The only additional authority referred to was *Short* v. *Spackman.* (1)

Quain, Q.C. (*C. Russell* with him), for the plaintiffs, was not called upon.

KELLY, C.B. I think this case is free from doubt or difficulty. The contract was made in the name of Cherry, the agent: but the case shews that it was made on behalf of a principal who was named at the time. I think the plaintiffs had a right to sue either the agent or the principal, at their election. No doubt, the election being once determined, there is an end of the matter; as, where the agent has been sued to judgment. Here, however, nothing was done to determine the election at the time this action was brought against the principal. The question was, I think, properly left to the jury, and upon proper evidence; and the verdict was quite right. There is no ground for granting a rule.

MARTIN, B. The true rule was laid down by Parke, B., in *Higgins* v. *Senior.* (2) The fact of his name having been mentioned at the time, did not make Dobell the less a principal.

(1) 2 B. & Ad. 962. (2) 8 M. & W. 834.

1871

CALDER v. DOBELL.

BLACKBURN, J. I apprehend that where a man is acting as agent, the principal is not the less bound because the contract is so drawn as to make the agent also liable. There are many cases where, although a man is acting for another, he is not contracting for another. The distinction suggested by Mr. Holker is new to me. Contracts are frequently made by masters of ships, charter-parties and other contracts; nobody ever doubted that the owners might sue and be sued upon them.

HANNEN, J., referred to Story on Agency, § 160. a., where it is said: "If the agent possesses due authority to make a written contract not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or *whether the principal be known or unknown,* the agent will be liable to be sued and be entitled to sue thereon and his principal also will be liable to be sued and be entitled to sue thereon, in all cases, unless from the attendant circumstances it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal upon it."

The rest of the Court concurred.

Judgment affirmed.

Attorneys for plaintiffs: *G. L. P. Eyre & Co., for Garvett & Tarbet, Liverpool.*

Attorneys for defendant: *Chester & Urquhart, for Laces, Banner, & Co., Liverpool.*

June 16.

[IN THE EXCHEQUER CHAMBER.]

GRAVENOR *v.* WATKINS AND ANOTHER.

Devise, Construction of—Repugnant Provisions—Life Estate—Remainder in Fee.

20 Eq 187.

Testator devised as follows:—"I devise and bequeath to my dear mother, Mary, the wife of R. G., all my real and personal estate, &c.; and, knowing that what I give, devise, and bequeath to my said mother will become the property of her husband, my kind step-father, R. G., I therefore declare the intention of this my will to be, that the said R. G., being my dear mother's husband, and a kind step-father to me, shall hold and enjoy all my said real and personal estate and property of every sort and kind, to him, his heirs, &c., for ever, to be absolutely

1871

GRAVENOR v. WATKINS.

at his free will and disposal; provided that he does not at any time dispose of any portion of my said property to any or either of my late father T. G.'s family, who have lately treated me so unkindly:"—

Held, by the Court of Common Pleas, that the mother took an estate for life in the realty, and R. G., the step-father, a remainder in fee.

Held, by the Exchequer Chamber, that, whatever was the nature of the interest taken by the mother, R. G. took an estate in fee.

EJECTMENT for the recovery of a messuage, farm, and lands, and a cottage, known as Llanarch Farm, in the parish of Llanvichangel-Nant-Melan, in the county of Radnor. The defendant Watkins did not appear; and the defendant Bozward obtained leave to appear and defend for all the premises mentioned in the writ. The following case was stated under a judge's order:—

1. Thomas Griffith, of Walton, in the county of Radnor, deceased, on the 17th of December, 1842, made his will, duly executed and attested, as follows:—

"I, Thomas Griffith, of Walton, in the county of Radnor, do declare this to be my last will and testament, as follows, that is to say, I hereby devise and bequeath to my dear mother, Mary, the wife of Richard Gravenor, of Walton aforesaid, and with whom I live, all my real and personal estate of every sort and kind whatsoever and wheresoever, and all my property in reversion, remainder, or expectancy, or that now is or may at any time previous to my decease be in my possession; and, knowing that what I give, devise, and bequeath to my said mother will become the property of her husband, my kind step-father, Richard Gravenor, I therefore declare the intention of this my will to be that the said Richard Gravenor, being my dear mother's husband and a kind step-father to me, shall hold and enjoy all my said real and personal estate and property of every sort and kind, to him, his heirs, executors, administrators, and assigns for ever, and to be absolutely at his free will and disposal; provided that he does not at any time dispose of any portion of my said property to any or either of my late father Thomas Griffith's family, who have lately treated me so unkindly, and expressed themselves so unfavourably towards me. I direct that all my just debts and funeral and testamentary expenses be paid out of my real estate, if the personal should not be sufficient, by my executors hereinafter named, and whom I appoint to be such executors are my said step-father, Richard

1871

GRAVENOR v. WATKINS.

Gravenor, and my friend William Peter Edwards, of Hindwell; to the latter of whom I give and bequeath the sum of 10*l.* as a token of regard I have for him."

2. At the date of his will, and thence continually until his death, the testator Thomas Griffith was seised in fee and in receipt of the rents and profits of the premises sought to be recovered in this action, and from the death of his father resided with his mother on a farm which had been rented by his father; and the person described in the will as Richard Gravenor, who was married to the testator's mother, came and resided with her and her son on such farm.

3. The testator, Thomas Griffith, died on the 20th of September, 1858, without having revoked or altered his said will, which was proved at Hereford on the 22nd of October, 1858, by the executors therein named.

4. Upon the death of the testator, Richard Gravenor, the person described in the will as the step-father of the testator Thomas Griffith, continued to reside, as before the testator's death, with his wife, the testator's mother, and with her entered into the possession or the receipt of the rents and profits, and continued without interruption to receive the same rents and profits till his death, which took place on the 22nd of December, 1859, in the lifetime of his wife, the testator's mother.

5. Richard Gravenor, the step-father of the testator, made his last will and testament in writing, dated the 15th of June, 1859, which contained the following clause:—"I give and devise all the messuages, lands, tenements, hereditaments, and real estate of every tenure, of or to which I shall at my death be seised or entitled, or of which I shall at my death have power to dispose by will, unto and to the use of Arthur Dickson Edwards and Richard Gravenor, their heirs and assigns, upon trust that they the said Arthur Dickson Edwards and Richard Gravenor, or the survivors of them, or the heirs of such survivor, shall as soon as may be after the decease of my wife, the said Mary Gravenor, who has a life-estate therein, sell the same" in manner in and by the said will directed. Richard Gravenor, the devisee named in the will last mentioned, is the plaintiff in this action.

6. The testator Richard Gravenor died on the 22nd of De-

cember, 1859, leaving his said wife, the mother of the testator Thomas Griffith, him surviving, and without having done any act to alien his interest in the premises the subject of this action, and without having revoked or altered his said will, which was duly proved by the executors therein named.

7. Arthur Dickson Edwards died on the 7th of November, 1861, leaving the plaintiff, Richard Gravenor, his co-trustee and co-executor, him surviving.

8. After the death of the testator Richard Gravenor, his widow, Mary Gravenor, continued to receive the rents and profits of the premises the subject of this action until the 16th of December, 1861, when she intermarried with the defendant John Bozward. A deed of settlement was executed previously to their marriage. It was dated the 16th of December, 1861, and expressed to be made between Mary Gravenor, widow, of the one part, and the defendant John Bozward of the other part. [A copy was appended to the case.] From the 16th of December, 1861, down to the date of the death of Mary Bozward, which took place on the 27th of May, 1866, the defendant Bozward continued to receive, and has since such death been in possession and receipt of the rents and profits of the premises the subject of this action.

9. The plaintiff claims to have been entitled, since the 27th of May, 1866, to these premises, as surviving devisee in trust under the will of Richard Gravenor.

The question for the opinion of the Court is, whether, under the circumstances above mentioned, the plaintiff is entitled to recover for the whole or any part of the land and premises.

April 27. *Brown, Q.C.* (*Harington* with him), for the plaintiff. There are two constructions by which the provisions of the will may be read so as to avoid repugnancy. There is no doubt that the testator intended that Richard Gravenor, his step-father, should take some estate. The will may either be construed as giving a life-estate to the mother, and a remainder in fee to the step-father, or as giving the fee to the mother to the use of the step-father. If either of these constructions be adopted, the plaintiff is entitled to judgment. If neither be adopted, and the provisions are treated as repugnant, according to the general rule of construction as to wills,

1871

GRAVENOR v. WATKINS.

the last must prevail. He cited *Callard* v. *Callard* (1); *Boydell* v. *Walthall* (2); *Paice* v. *Archbishop of Canterbury* (3); Saunders on Uses, 5th ed. 95; 1 Jarman on Wills, 3rd ed. 442; Bro. Abr. Feoffment to Uses, pl. 51; *Sherratt* v. *Bentley*. (4)

Manisty, Q.C. (*Merewether* with him), for the defendant, contended that the will contained an absolute devise of the whole beneficial interest to the mother, and that the step-father took nothing, or, at the most, that there was only a trust in his favour; or, assuming that there was a devise to the mother, and also a devise to the father, the two were not necessarily repugnant, but might well stand together, and then the two devisees would take as joint tenants in entireties; the effect of which would be that the whole would go to the survivor. He cited Co. Litt. 112, b., n. 1, by Butler; *Paramour* v. *Yardley* (5); *Bennet's Case* (6); *Anonymous* (6); *Ulrich* v. *Litchfield* (7); *Ridout* v. *Pain* (8); Jarman on Wills, 3rd ed. 442, 445. And he sought to distinguish *Sherratt* v. *Bentley* (4), on the ground that that was dealt with as a case of repugnancy. He further contended that, if the mother were held to take a life-estate only, and the step-father had died the day before the testator, the estate would then have gone to the father's family, which would have been manifestly contrary to the testator's intention.

J. Brown, Q.C., in reply.

BOVILL, C.J. It is extremely difficult to construe one will by the light of decisions upon other wills framed in different language. The Court must in each case endeavour to ascertain the meaning of the testator from the language he has used. If there are two devises which are entirely repugnant and irreconcileable, in some cases (extreme ones no doubt they must be) both must be rejected. But, in order to prevent the intention of the testator from being entirely defeated, effect is sometimes given to the later devise. Sometimes effect is given to both devises, as, where the same estate is given to two different persons in two different parts of the will;

(1) Cro. Eliz. 344.
(2) Moore, 722.
(3) 14 Ves. 364.
(4) 2 M. & K. 149.
(5) Plowd. 541.
(6) Cro. Eliz. 9.
(7) 2 Atk. 372.
(8) 3 Atk. 486, 492, 493.

in such a case it has been held that both may take as tenants in common, or, if they be husband and wife, possibly they may take as tenants by entirety. So, effect may be given to two apparently contradictory devises by restricting one or other of them to an estate for life, instead of a fee. But the precise effect to be given to the will where there are apparently conflicting devises must in all cases depend upon the intention to be collected from the language of the will itself; and effect must, if possible, be given to every part of the instrument.

The will in the present case professes to dispose of the whole real and personal estate of the testator. There is an express devise and bequest of the whole to the testator's mother in terms which since the Wills Act (1 Vict. c. 26,) would, if nothing else was found in the will, give her an interest in fee in the realty and an absolute interest in the personalty. There is also in the will the clearest possible declaration of the testator's intention that the husband of his mother shall hold and enjoy all the testator's real and personal estate and property of every sort and kind, to him, his heirs, &c., for ever, and to be absolutely at his free will and disposal,—with a restriction against alienation of any portion of it in favour of the family of the testator's father. There are therefore two clear indications of intention on the part of the testator to dispose of the whole of his real and personal estate, the one in favour of his mother, the other in favour of his step-father. It is impossible to say that, construing the words literally, there is not an inconsistency. But one thing is manifest, viz. that the testator did not contemplate an intestacy as to any part of his property, and did not think he was making two inconsistent devises. If the two are to be treated as absolute dispositions of the fee, there is no indication on the face of the will as to which of the parties was to take in preference to the other. There is an equally clear intention to benefit both. I collect also that there was no intention on the part of the testator to give the absolute and entire interest to his step-father to the exclusion of his mother, and to give him the power to dispose of the property without her consent. It is equally clear that the mother was not to have the power of absolutely disposing of the property; for, if that had been his intention, I should have expected to find the same restriction against the alienation in

1871

GRAVENOR v. WATKINS.

favour of her children which is imposed in the devise to the step-father. Is there, then, any reasonable construction which will give effect to both devises? I see one which seems to me to be a reasonable interpretation, viz. that the mother takes an estate for life, and the step-father an absolute estate in fee at her death. Will the language of the will fairly justify that interpretation? The first and most obvious ground, as it seems to me, for adopting it is this, that in the two devises there is a manifest difference in the language which the testator employs. In the devise to the mother there are no words of inheritance, nor any words of limitation or restriction; whereas, the step-father is to "hold and enjoy" the property "to him and his heirs, &c., for ever," and it is to be "absolutely at his free will and disposal,"—provided that he does not at any time dispose of any portion of it in favour of any of the testator's late father's family. That is a difference which seems to me to be a very material one when we are considering what is the intention of the testator to be collected from the whole will. It is quite true that since the Wills Act the words of the devise to the wife are sufficient of themselves to give her a fee in the realty and an absolute interest in the personalty. I will deal with the devise, therefore, as if it contained words of inheritance. Assuming that to be so, there is in the whole will such a clear indication of intention as would induce me to reject the words of inheritance, as was done by Sir John Leach, V.C., and Lord Chancellor Brougham, in the case of *Sherratt* v. *Bentley*. (1) The absence of words of inheritance in the one case, and their insertion in the other, to my mind shew a clear indication of intention that the devise to the step-father should be of the fee, and that to the mother an estate for life, as it would have been before the Wills Act. Again, the expression in the will, with which the testator prefaces the devise to the step-father, "knowing that what I give, devise, and bequeath to my said mother will become the property of her husband, my kind step-father," refers to a future period; and I think it is not unreasonable to suppose that the testator intended to refer to the death of his mother, and that his notion may have been that the expressions he had used would give the property to his step-father upon his mother's death. At all events, the expressions he has used

(1) 2 M. & K. 149.

are entirely consistent with that view. Putting such a construction upon the whole will as will give effect to every part of it, and will consist with what may be collected from the will itself to have been the general intention of the testator, I think these two devises are not so repugnant that both must be rejected so as to let in the heir-at-law and the personal representative. I am of opinion that they do not amount to a devise to the mother and the step-father as tenants in entirety, as contended by Mr. Manisty; nor to a devise to the wife in trust for her husband. And I am further of opinion that it was not the intention of the testator to give an estate in fee to the step-father to the exclusion of the mother. But, upon the whole, I think the correct construction is to hold that the wife took an estate for life, and the step-father the remainder in fee. That is a construction which appears to me to satisfy all the rules as to the construction of wills, and to give effect to every part of the instrument in question. For these reasons, I think the plaintiff is entitled to judgment.

BYLES, J. I am of the same opinion. I entertained some doubt at first, but now I entertain none. We are to give effect to every part of the will, and to all its words, if possible. The first devise here to the mother of the testator would, if it had stood alone, have given her a fee. But, if it be so construed, the devise to Richard Gravenor would be repugnant. We must, therefore, consider whether such a construction cannot be put upon the two devises as that both may have effect,—whether the testator did not mean to give his mother such an interest as would allow the estate devised to the step-father to come into existence; in other words, whether he did not intend to limit her interest to an estate for life. Reliance has been placed upon the use of the word "estate," and also upon s. 18 of the Wills Act (1 Vict. c. 26), which enacts that, "where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." That leaves the matter pretty much as it was before. In the present case, it seems to me that a contrary intention does appear in plain

1871

GRAVENOR v. WATKINS.

and unambiguous language; for, an estate is given to the step-father which certainly could not come into existence unless the devise to the mother is construed to be a life-estate; and one cannot help observing besides that the testator seems to have thought that words of inheritance were necessary to convey the fee. In the devise to the mother there are no such words; but, in the devise to the step-father, the testator in clear and unmistakeable language declares the intention of his will to be that he "shall hold and enjoy all my said real and personal estate and property of every sort and kind, to him, his heirs, &c., for ever, and to be absolutely at his free will and disposal," with an exception which need not be noticed; thus giving him an assignable and inheritable estate. I think the case a very clear one.

MONTAGUE SMITH, J. I am of the same opinion. I agree with Mr. Manisty that the will must be read as a whole, and that effect is to be given to all the words as far as it is possible to do so. The intention of the testator can only be arrived at by considering all the language he has employed. Endeavouring to reach the mind of this testator through the words which he has used, I have come to the conclusion that he intended to give an estate for life to his mother, with a remainder in fee to his step-father, with a prohibitory condition attached to the remainder in fee that the step-father should not at any time dispose of any portion of the property to any or either of the testator's late father's family. It may be that the condition, though good in point of law, was inoperative under the particular circumstances of the case. But we must, nevertheless, look at that condition (it being a part of the devise) in order to arrive at the real intention of the testator. Now, it is perfectly true that the words of the first part of the clause are sufficient in themselves to give an estate in fee to the wife. But that is not the whole of the clause: it does not stop at the words "in my possession;" it goes on, "and, knowing that what I give, devise, and bequeath to my said mother will become the property of her husband, my kind step-father, Richard Gravenor, I therefore declare the intention of this my will to be that the said Richard Gravenor, being my dear mother's husband and a kind step-father to me, shall hold and enjoy all my said real and personal estate

and property of every sort and kind, to him, his heirs, executors, administrators, and assigns for ever, and to be absolutely at his free will and disposal; provided that he does not at any time dispose of any portion of my said property to any or either of my late father Thomas Griffith's family," &c. Those words form part of the devise; and, taking the whole together, the meaning of it seems to me to be this,—knowing that if I give the fee to my mother, she will leave it to her husband, I wish the gift to come from myself to him; and I further wish to put a condition or prohibition against alienation in favour of any of my father's family on the person who is to take the fee. It seems to me that the language the testator has used is consistent with that intention, and with that intention alone. No doubt, as I before observed, the word "estate" is large enough to carry the fee, but it is not the most apt expression for that purpose. And, when the testator clearly wishes to pass the fee, we find he uses the proper legal and technical words, as well as those which in a popular sense are understood to give the whole absolute interest. Mr. Manisty at first contended that the mother of the testator took the whole estate, and that the step-father took nothing. Upon no construction do I think that that can be the proper meaning of the will. His next contention was,—and that seemed to me to raise a grave question,—that the devise might be read as a devise of the whole estate to the husband and wife in entireties. That point was very fully and very ably argued by Mr. Manisty. But it seems to me (rejecting the notion that the step-father took nothing) that, having to draw one of two conclusions, either that this was a devise to the husband and wife in entireties, or a devise to the wife for life, with remainder in fee to the husband, we should not be giving effect to all the language if we were to adopt the first alternative. In the first place, the devise does not warrant it in terms; and, dealing with them as two separate devises, there are no words of inheritance in the first, but there are in the second; and, if Mr. Manisty's construction were to prevail, the prohibitory clause might have no effect at all, for it clearly would not apply to the estate of the wife, and consequently, if she survived her husband, the testator's step-father, she might give the estate to her first husband's family, and so an apparently strongly-cherished intention of the testator would

1871

GRAVENOR v. WATKINS.

be defeated. I think we ought not to put a strained construction upon a will which would have the effect of defeating the testator's intention, when there is a perfectly natural construction which will give full effect to every part of the will. For these reasons I think the conclusion arrived at by my Lord and my Brother Byles is the right one, and that the plaintiff is entitled to our judgment.

BRETT, J. The primary rule of construction is, to give effect, if possible, to the whole will. If there is a construction which will so operate without doing violence to any part of the will, that construction ought to be adopted. Several constructions have been suggested by Mr. Manisty. First, it was said that there is an absolute devise of the fee to the mother, and no devise to the step-father, or, at the most, only a trust in his favour. Now, as there are no words of inheritance in the devise to the mother, the statute must be relied on; but the statute does not help out the want of words of inheritance, so as to give the fee-simple, where a contrary intention appears by the will. I think such contrary intention does appear here, because, if the first devise be held to convey the fee, the second becomes altogether inoperative; and yet the words of the devise to the step-father are to my mind exceedingly strong to shew an intention on the part of the testator to give an estate in fee to him. The testator emphatically says, "I declare *the intention of this my will* to be," &c. Moreover, if the construction suggested be adopted, the prohibition as to the father's family may become ineffectual; and, further, it makes the difference of expression in the two parts of the devise,—in the first of which the word "estate" only is used, and in the second, the ordinary recognised words of inheritance,—wholly inexplicable. As to there being a trust for the husband, that suggestion is, I think, disposed of by the total absence of words of trust, and by the declaration of the testator that his step-father shall hold and enjoy the property "to him, his heirs and assigns, for ever, and to be absolutely at his free will and disposal." That is utterly inconsistent with his being a mere cestui que trust. Then it was said that, taking the whole together, it is a devise of the fee to the husband and wife in entireties. In the first place, that is a con-

struction which is not to be adopted until every other possible construction has failed; and it can only have place where without resorting to it there would be a manifest repugnancy. But, if the view which we take of the whole will be the correct one, viz. that the mother took an estate for life, and the step-father a remainder in fee, that doctrine has no application. That construction is amply provided against by the language of the second devise, which gives the testator's step-father a vested interest; and, further, the prohibition against disposing of any of the property in favour of the father's family would, if that view were adopted, fail to have full effect. Another suggested construction was, that the devise is to the wife for the use of the husband, so as by virtue of the Statute of Uses at once to vest the legal estate in the husband. The objection to that seems to me to be that it gives no effect to the prohibitory clause in the second devise. The remaining suggestion is that the property is given to the mother for life, remainder to the step-father in fee. The only objection to that construction seems to be that suggested by Mr. Manisty, viz. that, in the event of the step-father dying before the testator, there would be a lapse and an intestacy. If, however, that had occurred, there was nothing to prevent the testator from making a new will. It seems to me that the construction we have arrived at gives effect to the first part of the devise, and also gives full effect to the second, as well as to the prohibitory condition, and does not infringe any of the ordinary rules of construction. I agree that there should be judgment for the plaintiff.

Judgment for the plaintiff.

The defendants brought error in the Exchequer Chamber, and the case was argued before Kelly, C.B., Martin, B., Blackburn, J., Channell, B., Lush, J., Hannen, J., and Cleasby, B., by

June 16. *Joshua Williams, Q.C.* (*Merewether* with him), for the defendants. The testator was evidently under an impression that what he gave to his mother would go to his step-father upon her death, in his marital right, which would be true as to the personal, but not as to the real estate; and this is a distinction which the

1871

GRAVENOR v. WATKINS.

Court below also seem to have lost sight of. *Sherratt* v. *Bentley* (1), upon which the Court of Common Pleas seemed to found their opinion, is clearly distinguishable. There is nothing in the decision in that case which is inconsistent with any rule of law. It is assumed here that the testator meant to give everything to his step-father. He has not, however, said so. He does not in terms give him anything; all he says is, that, knowing that what he gives to his mother will somehow become the property of his step-father, he expresses a wish or intention that he shall hold it (if he gets it) to him and his heirs absolutely. If the law does not give him an estate of inheritance, the will certainly does not. There are numerous authorities to shew that a testator's erroneous impression as to the legal effect of a devise in his will, does not prevent the proper legal construction being put upon it by the courts. Among others, the following may be referred to in support of that position: *Thomas* v. *Thomas* (2); *Attorney-General* v. *Lloyd* (3); *Dashwood* v. *Peyton*. (4) Suppose the mother had died in the lifetime of the testator, what interest would this devise give to the step-father? Clearly not a fee. It is not possible, with any regard to the true rules of construction, to ignore the absolute devise to the wife. *Brookman* v. *Smith* (5) was also referred to.

J. Brown, Q.C. (*Harington* with him), for the plaintiff, was not called upon.

KELLY, C.B. We are all of opinion that the judgment of the Court below should be affirmed. When we look at the will, we find it contains in the first instance a gift of an estate to the testator's mother in such terms as, if the will had stopped there, would primâ facie import an estate in fee-simple. The words are,—"I devise and bequeath to my dear mother" "all my real and personal estate of every sort and kind whatsoever and wheresoever, and all my property in reversion, remainder, or expectancy, or that now is or may at any time previous to my decease be in my possession." No words of inheritance being necessary since the Wills Act of 1 Vict. c. 26 to convey a fee, these words might well pass the fee

(1) 2 M. & K. 149.
(2) 3 B. & C. 825.
(3) 1 Ves. Sen. 32.
(4) 18 Ves. 27.
(5) Law Rep. 6 Ex. 291.

1871

GRAVENOR v. WATKINS.

to the testator's mother. That, however, would only be so if there was nothing else in the will which would necessarily lead to a contrary construction. It is unnecessary to construe that devise so as to limit it to a life-estate; but there are other words in this will which make it manifestly inconsistent to construe them as giving the mother a fee. Those words are,—"and, knowing that what I give, devise, and bequeath to my said mother will become the property of her husband, my kind step-father Richard Gravenor, I therefore declare the intention of this my will to be that the said Richard Gravenor, being my dear mother's husband and a kind step-father to me, shall hold and enjoy all my said real and personal estate and property of every sort and kind, to him, his heirs, &c., for ever, and to be absolutely at his free will and disposal; provided that he does not at any time dispose of any portion of my said property to any or either of my late father Thomas Griffith's family." It has been contended on the part of the defendants that the Court is bound to hold that that devise can only take effect by assuming a supposition on the part of the testator that there was already a gift in fee-simple to his mother, and that, upon her death, the property would pass by operation of law to her husband. But, when we find by subsequent words an absolute gift to the husband, it is quite immaterial whether the testator correctly understood the law or not. If I were at liberty to conjecture, I should say it was perfectly possible that the testator might have heard something about tenancy by the courtesy; and, as he had given his mother no power to enable her to dispose of the property by deed or will, he might well have supposed that the husband would take at least a life-estate. That may have been a very natural and proper desire. The words are,—"Knowing that what I devise to my mother will become the property" (not saying, in fee-simple) "of her husband," &c., "I therefore declare the intention of this my will to be," &c. I do not say that that is the true construction of the devise; but I think it extremely probable that something like that was passing in the mind of the testator when he made his will. After the recital above mentioned come words of distinct gift to the step-father, which are abundantly sufficient to carry a fee. Taking those words by themselves, as a separate and substantive devise, what language could be more express? We must either strike

1871

GRAVENOR v. WATKINS.

them entirely out of the will or we must give some effect to them. Read by themselves, the only effect we can give to them is, that they give the step-father an estate in fee. If we read them with the previous part of the devise (bearing in mind the absence of words of inheritance), we must put such a construction upon them as will give them some effect. Now, without entering nicely into the question what is the precise nature of the estate given to the mother, here is an absolute and perfect devise of the fee-simple to the step-father, subject to an interest in the mother, and subject to a proviso or restriction upon which, as it never came into operation, we are not called upon to put a construction. I may, however, observe that it purports to be a restriction upon the husband only. It is clear, therefore, that the testator must have meant a substantive gift to the step-father, distinct from and collateral to any estate which he may have supposed that he would have derived from his wife. I say that this clause of restriction,—whether valid or not, I will not stop to consider,—clearly shews that the testator intended to give a separate and distinct estate of fee-simple to his step-father; for, it could have had no operation if the fee passed by the first devise to the mother, as has been suggested. It is certain that the testator intended him to take the fee at some time, so as to be enabled to dispose of it. The only question is whether he has used words sufficient to carry out that intention. It is not because he may have had a vague and indefinite notion of the law that his intention is to be frustrated. Upon the whole, I have come to the conclusion that Richard Gravenor took a fee-simple, and that the judgment of the Court below should be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Merediths & Co.*
Attorneys for defendants: *Jones & Sons.*

OPPENHEIM *v.* THE WHITE LION HOTEL COMPANY, LIMITED. 1871 *June* 23.

Innkeeper—Liability for Loss of a Guest's Property—Contributory Negligence.

The plaintiff, a traveller, went to an hotel at Bristol, arriving at 11 P.M. In the commercial room he took from his pocket a canvas bag containing 22*l.* in gold, some silver, and a 5*l.* note, and took out 6*d.* to pay for some stamps. He was then shewn to a bedroom on an upper storey, the door of which had a lock and a bolt, and the window of which looked out on to a balcony. He was cautioned by the chambermaid that the window was open, but nothing was said about locking the door. On going to bed he closed the door, but did not lock or bolt it, and placed his clothes, the bag of money being in one of the pockets, on a chair at his bed side. During the night some one entered his room by the door while he slept, and stole the bag and money.

The judge (of a county court), in summing up the case to the jury, after explaining to them the law as to the liability of innkeepers for the safe custody of the property of their guests, told them that the question for their consideration was whether the loss would or would not have happened if the plaintiff had used the ordinary care that a prudent man might reasonably be expected to have taken under the circumstances. The jury found for the defendants:—

Held, that the direction was right, and the verdict warranted by the evidence.

APPEAL against a decision of the judge of the Gloucestershire county court in an action brought by the plaintiff against the defendants, who keep a common inn for the accommodation of travellers, to recover damages for the loss by the plaintiff when a guest therein of a bag containing 22*l.* 6*s.*, through the alleged negligence of the defendants.

1. The plaintiff is a manufacturer and general merchant carrying on business in London. The defendants are a limited company carrying on the business of common innkeepers in Broad Street, Bristol.

2. The plaintiff, who occasionally travels for the purpose of his business, had for several years before the commencement of this action, when in Bristol, resorted to the White Lion.

3. On the 31st of August, 1870, the plaintiff came to Bristol and went to the White Lion. He arrived at about 11 o'clock in the evening, and was received as a traveller, and a bedroom for the night was appropriated for his use. The plaintiff went into the commercial room, where he remained till about 12 o'clock, when he proceeded to his bedroom.

4. When the plaintiff arrived at the inn, he had with him a

1871

OPPENHEIM v. WHITE LION HOTEL CO.

canvas bag containing 22*l.* in gold, 6*s*, and the half of a 5*l.* note, such bag, with its contents, being in the pocket of the trousers which he then wore.

5. When in the commercial room the plaintiff did not exhibit his money, nor mention to any one that he had any money in his possession; but, about five minutes before he went to his bedroom, he took out the canvas bag from his pocket and took 6*d.* from it to pay for some postage-stamps. He then replaced the bag in his pocket.

6. The plaintiff was shewn to his bedroom by the chamber-maid, who remarked to him that the window of his bedroom was open, to which he replied that he always slept with his window open.

7. The plaintiff's bedroom was on an upper storey of the defendants' premises. The window opened on to a balcony, into which two other rooms of the inn looked.

8. The door of the bedroom had attached to the inside of it a bolt and a lock with a key in it, both in good order and repair.

9. After the plaintiff entered his bedroom he closed the door, proceeded to undress, and placed his trousers, in the pocket of which the bag containing the money then was, on a chair by the side of his bed, on the side farthest from the door, and in such a position that any one entering the room would have had to go round the bed to get to the chair.

10. The plaintiff then went to bed without having locked or bolted the door of the room,—the door remaining shut.

11. There was no notice in the plaintiff's room requiring guests to lock or bolt their doors; nor had the plaintiff seen any such notice in any part of the inn; nor was he told by any of the defendants' servants that guests were required or advised to lock or bolt their doors. The plaintiff, in giving his evidence, stated that he was generally in the habit of locking his bedroom doors when sleeping in an inn, but he had not done so on the occasion in question.

12. The plaintiff got up at 7 o'clock the next morning. The door of the room was then shut.

13. The plaintiff then saw lying on the floor of his room some bits of paper and a small toy-sample, which had been in the

trousers pocket in which the money was. The pocket of the trousers was turned half out, and the bag with the money contained therein was not in the pocket, nor to be found in the room.

14. The plaintiff communicated his loss to the manager of the hotel, who sent for detectives, but nothing was discovered.

15. At the hearing it was proved, or admitted, that the plaintiff had in his possession 27*l.* in money and a note contained in a bag which was in the pocket of his trousers when he retired to bed; that some person had during the night stolen the same; that such person could not possibly have entered by means of the window of the bedroom; and that the robbery could only have been effected by a person entering the plaintiff's bedroom by the door.

16. It was contended for the defendants that the plaintiff, in neglecting to lock or bolt his door, was guilty of negligence, so as to exonerate the defendants from their liability as innkeepers to make good the plaintiff's loss.

17. The judge in summing up the case to the jury, after explaining the law as to the liability of innkeepers for the safe custody of the property of their guests, told them that the question for their consideration was, whether the loss would or would not have happened if the plaintiff had used the ordinary care that a prudent man might reasonably be expected to have taken under the circumstances; adding that, in the former case they would find for the plaintiff, in the latter for the defendants. The jury found for the defendants.

The question for the opinion of the Court was, whether the judge of the county court was right in leaving the question of negligence to the jury in the form above stated, without telling them that the facts proved did not in law amount to such negligence as would exonerate the defendants from their liability as innkeepers to reimburse the plaintiff for his loss.

Oppenheim, for the plaintiff. Although it was a question of fact for the jury whether or not the plaintiff had been guilty of negligence or contributory negligence, yet what constitutes contributory negligence is a question of law, and the judge ought to have ex-

1871

OPPENHEIM v. WHITE LION HOTEL CO.

plained to the jury what in point of law constitutes that ordinary degree of care which a prudent man would have taken. The only evidence of negligence on the plaintiff's part here was omitting to lock his bedroom door. Now, there is clearly no obligation imposed by law upon a guest at an inn to lock his bedroom door: *Morgan* v. *Ravey* (1); *Mitchell* v. *Woods* (2); at all events, unless there be an express notice of the danger of omitting that precaution brought home to the guest. In *Calye's Case* (3), it is laid down, that "the innkeeper is bound in law to keep them" (that is, the goods of a guest,) "safe without any stealing or purloining; and it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber door open (4); but he ought to keep the goods and chattels of his guests there in safety,"—referring to 22 Hen. 6, fo. 21. b; 11 Hen. 4, fo. 45. a. b; 42 Edw. 3, fo. 11. a; Moore, 78, pl. 207. (5) In *Farnworth* v. *Packwood* (6), and *Burgess* v. *Clements* (7), the goods were deposited by the guest in a room which he held as a warehouse, and of which he had exclusive possession and a key; and in the latter case Lord Ellenborough says (8): "I agree that, if the innkeeper gives the keys of the chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper." And see *Richmond* v. *Smith*. (9) In *Armistead* v. *Wilde* (10), the guest had been guilty of gross negligence, in ostentatiously shewing the money in the presence of several persons, and then openly putting it into an ill-secured box and leaving it in the travellers' room, from whence it was stolen; and there the judge explained to the jury what constituted negligence. The absence of such an explanation was

(1) 6 H. & N. 265; 30 L. J. (Ex.) 131.

(2) 16 L. T. (N. S.) 676.

(3) 8 Co. Rep. 32 (a), 33 (a).

(4) "Unlocked:" per Erle, J., in *Cashill* v. *Wright*, 6 E. & B. 895.

(5) The case in Moore is thus stated: "Un vient al un inn, et le hostler dit a luy, icy sont persons resortant a cest meason, et jeo ne scavoy lour behaviour, pur que prendres icy le clave de tiel chamber et mesta vostre choses la a vostre peril, car jes ne voil prender ascun charge deux: et apres les biens fueront embles:" and it was held that the innkeeper was guilty of negligence and liable for the loss. But see Moore, 158.

(6) 1 Stark. 249.

(7) 4 M. & S. 306.

(8) 4 M. & S. 310.

(9) 8 B. & C. 9.

(10) 17 Q. B. 261; 20 L. J. (Q.B.) 524.

held, in *Cashill* v. *Wright* (1), to amount to a misdirection. "It does not appear," said Erle, J., in delivering the judgment of the Court, "that there was any information given to the jury as to what they were to understand by gross negligence. If they were told to understand by gross negligence the absence of that ordinary care which, under the circumstances, a prudent man ought to have taken, as seems to have been the meaning given to gross negligence in some of the modern cases cited before us, the direction as to the degree of negligence might not have been objectionable: but the legal meaning of gross negligence is, greater negligence than the absence of such ordinary care. It is such a degree of negligence as excludes the loosest degree of care, and is said to amount to dolus. We think that the rule of law resulting from all the authorities is, that, in a case like the present, the goods remain under the charge of the innkeeper and the protection of the inn, so as to make the innkeeper liable, as for breach of duty, *unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.* We think, therefore, that the direction in the present case cannot be supported." So here, it was for the judge to say whether or not there was any evidence of negligence: he should have explained to the jury what amounts to ordinary care, and should have told them distinctly that the mere omission to lock the bedroom door did not constitute such negligence on the part of the guest as to obliterate the obligation the law casts upon an innkeeper.

Charles, for the defendants, was not called upon.

WILLES, J. I am of opinion that the ruling of the county-court judge ought to be affirmed. It appears that the plaintiff went to the White Lion Inn, at Bristol, an establishment of considerable size, and was received as a guest. He had with him a sum of money in a bag, of which he does not seem to have made any show. He went to bed in a room the door of which had a bolt and a lock and key. He did not, however, lock or bolt the door, and he left open a window which looked on to a balcony. He

(1) 6 E. & B. 891. 2 Jur. N.S. 1072.

1871

OPPENHEIM v. WHITE LION HOTEL CO.

placed his trousers with the money in the pocket on a chair by his bed side, whence it might easily be abstracted by any person getting into the room whilst he was asleep. The money was stolen. The person who stole it appears to have got in at the door. Now, it is impossible to lay it down as a matter of law that it is any answer for the innkeeper to say that the guest has left his door unlocked; he is bound to keep securely the goods of his guest. When Lord Coke, in *Calye's Case* (1), refers to the authorities in the Year Books to shew that the innkeeper is liable though the guest has a key and does not use it, all he means is that the innkeeper cannot get rid of his common-law liability by giving the guest a key. But he by no means lays it down that the guest may not be guilty of negligence in abstaining from using it. For instance, if there were races in the neighbourhood which caused a great number of suspicious characters to be about the inn. Lord Coke goes on to say: "But, if the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the innkeeper shall not be charged; for, there the fault is in the guest to have such a companion or servant; and the words of the writ are pro defectu hospitator' seu servientium suorum. But, if the innkeeper appoint one to lodge with him, he shall answer for him, as it there appears. The innkeeper requires his guest that he will put his goods in such a chamber under lock and key, and then he will warrant them, otherwise not, the guest lets them lie in an outer court, where they are taken away, the innkeeper shall not be charged, for the fault is in the guest, as it is held 10 Eliz. Dyer, 266." He does, therefore, intimate that the guest may by his conduct release the innkeeper from his common-law obligation. He evidently means that the fact of the guest having the means of securing his door and neglecting to avail himself of them affords the innkeeper no excuse by way of plea, as matter of law. The giving the guest a key, or giving a warning to lock his door, would certainly be a circumstance which might be urged in the innkeeper's favour. By omitting to lock his door, a jury might well think that the guest chose to take the risk of robbery upon himself, and that he ought to have taken more care. All these are ques-

(1) 8 Co. Rep. 32 (a).

tions of degree when forming a judgment on the facts. It seems to me that the question was quite correctly put to the jury here, and strictly in accordance with the law laid down in *Cashill* v. *Wright*. (1) Erle, J., there lays down the proper definition of negligence in terms which are not to be mistaken; and those terms are contained in the direction of the county-court judge to the jury in this case. In *Grill* v. *General Iron Screw Collier Co.* (2), which was a case of collision, negligence was defined to be the want of reasonable care by the exercise of which the collision could have been avoided: and that was affirmed in the Exchequer Chamber. (3) I would also refer to some ingenious remarks as to the misapplication of the term "gross negligence," which are to be found in Campbell's Law of Negligence, p. 11. In conclusion, I am of opinion that the summing-up here was perfectly right, and that there was evidence to justify the verdict.

KEATING, J. If there had been no evidence of negligence here, the case certainly ought not to have been left to the jury. But there were facts proved or admitted which the judge would not have been justified in withholding from them. I think he was quite right in leaving it to the jury to say whether or not, upon those facts, there was contributory negligence on the part of the guest. There were other circumstances besides the omission to lock the bedroom door. Although the plaintiff did not when in the commercial-room expose his money, he took the bag out of his pocket to take a coin from it; and it would seem that some one saw where the bag was put, for the thief went direct there. The plaintiff admitted that it was his usual habit to lock his bedroom door when at an inn, but that on this occasion he omitted to do so. The whole of the facts must be looked at. The only question was whether there was evidence of negligence on the plaintiff's part, which contributed to the loss. I think there was.

MONTAGUE SMITH, J. I am of the same opinion. It is not disputed that the direction was correct, as far as it went. It was in accordance with the law as laid down by Erle, J., in *Cashill* v.

(1) 6 E. & B. 891. (2) Law Rep. 1 C. P. 600.
(3) Law Rep. 3 C. P. 476.

1871

OPPENHEIM v. WHITE LION HOTEL CO.

Wright. (1) But Mr. Oppenheim contends that there was no evidence of negligence on the part of the plaintiff here, and that the judge ought to have directed the jury to find so. It seems to me, however, that there were circumstances in the conduct of the plaintiff which were proper to be left to the jury, and which it would have been wrong to withdraw from them. I agree that there is no obligation on a guest at an inn to lock his bedroom door. Though it is a precaution which a prudent man would take, I am far from saying that the omission to do so alone would relieve the innkeeper from his ordinary responsibility. The law of *Calye's Case* (2) may remain untouched. But the fact of the guest having the means of securing himself, and choosing not to use them, is one which with the other circumstances of the case should be left to the jury. The weight of it must, of course, depend upon the state of society at the time and place. What would be prudent in a small hotel, in a small town, might be the extreme of imprudence at a large hotel in a city like Bristol, where probably three hundred bed-rooms are occupied by people of all sorts. It was proved here that the plaintiff took out the bag in the commercial-room,—a public room. I cannot suppose that that fact would have been referred to unless there had been some significance in it. It does not appear to have been done ostentatiously; but he did take it for the purpose of taking sixpence out of it. Added to this, his bedroom door was furnished with a proper bolt and lock, and he left it unfastened. I think the direction was right, and that the jury came to a right conclusion.

Appeal dismissed.

Attorney for plaintiff: *J. J. Darley, for M. S. Mosely, Bristol.*
Attorneys for defendants: *Gregory, Rowcliffes, & Rawle.*

(1) 6 E. & B. 891. (2) 8 Co. Rep. 32 (a).

LEVY *v.* RUTLEY. 1871 *May* 31.

Dramatic Copyright—Joint Authorship—Alterations and Additions—3 & 4 *Wm.* 4, *c.* 15.

One who employs another to write a play for him, and even suggests the subject, does not thereby become the proprietor of the copyright.

In order to constitute a joint authorship of a dramatic piece or other literary work, it must be the result of a preconcerted joint design. Mere alterations, additions, or improvements by another person, whether with or without the sanction of the author, will not entitle such other person to claim to be "joint author" of the work.

The plaintiff, the lessee of a theatre, employed one W. to write a play for him, suggesting the subject. W. having completed it, the plaintiff and some members of his company introduced various alterations in the incidents and in the dialogue, to make the play more attractive, and one of them wrote an additional scene:—

Held, that these circumstances did not make the plaintiff joint author of the play with W.

The play being finished, a sum of 4*l.* 15*s.* was paid to W. on account, and he signed a receipt, drawn up by the plaintiff's attorney, as follows:—"Received of Mr. L. (the plaintiff) the sum of 4*l.* 15*s.* [on] account of 15 guineas for my share, title, and interest as co-author with him in the drama intituled, &c.; balance of 15 guineas to be paid on assigning my share to him." The balance was never paid, nor was any assignment executed by W.:—

Held, no evidence that the plaintiff was either "joint author" or assignee of the author.

THE first count of the declaration stated that, before and at the time of the grievances thereinafter mentioned, the plaintiff was the proprietor of and had the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment in any part of the United Kingdom, &c., a dramatic piece called "The King's Wager, or The Camp, the Cottage, and the Court," to wit, as joint author thereof; which dramatic piece had been and was composed, after the passing of 3 & 4 Wm. 4, c. 15, intituled, &c., by the plaintiff and one Wilks: yet the defendant, during the continuance of such sole liberty, and within twelve calendar months before the commencement of the suit, contrary to the intent of the statute, &c., and the right of the plaintiff as such joint author as aforesaid, wrongfully represented and caused to be represented, without the consent in writing of the plaintiff first had and obtained, at certain places of dramatic entertainment in England, the said production, and divers parts

1871

LEVY v. RUTLEY.

thereof; whereby the defendant became liable for each and every of such representations to the payment to the plaintiff of an amount not less than 40s. or to the full amount of the benefit or advantage arising from such representations, or the injury or loss sustained by the plaintiff therefrom, whichever was the greatest damage: averment, that the full amount of the benefit or advantage arising from each of such representations was the greater damage and the sum payable by the defendant to the plaintiff by reason of the premises.

The second count was similar to the first, but claiming the penalty of 40s. for each representation.

The third and fourth counts were similar to the first and second respectively, the plaintiff claiming therein to be assignee of the author.

Pleas: 1. Not guilty; 2. That the plaintiff was not the proprietor of and had not the sole liberty of representing the said dramatic piece, nor was he the joint author thereof as in the first and second counts mentioned; 3. That the plaintiff was not the proprietor of and had not the sole liberty of representing, nor was he the assignee of the author of the said dramatic piece, as in the third and fourth counts respectively alleged. Issue thereon.

The cause was tried before Byles, J., at the last assizes at Winchester. The substantial facts were as follows:—In the year 1836, the plaintiff, the then lessee of the Victoria Theatre, being desirous of producing a piece calculated to suit his company, amongst whom were two actors of considerable repute, Messrs. Oxberry and Hooper, employed one Wilks, a dramatic author, to write for him a drama in three acts, to be called "The King's Wager, or The Camp, the Cottage, and the Court." The drama, which purported to be founded upon the adventures of Charles II. after his escape from the battle of Worcester, was accordingly prepared and handed over to the plaintiff, and was by him submitted to his company. Some of the incidents being objected to by some members of the company, the plaintiff, with the assistance of Oxberry and Hooper, made various alterations and additions, one scene being entirely new. The drama thus altered was put upon the stage, and acted with much success. The price which the plaintiff had originally agreed to pay Wilks for his work was 20

guineas; but, when Wilks went to demand payment, the plaintiff refused to give him more than 10 guineas. It was, however, ultimately arranged, at the suggestion of one Noel, the plaintiff's then attorney, that Wilks should receive 15 guineas; and 4*l.* 15*s.* was paid to him on account, he signing the following receipt, which was written by Noel:—

"Received this 30th day of January, 1836, of Mr. Lawrence Levy the sum of four pounds fifteen shillings, account of fifteen guineas for my share, title, and interest as co-author with him in the drama intituled 'The King's Wager;' balance of fifteen guineas to be paid on assigning my share to him."

Wilks died in 1854. The play having been published in 1840, the twenty-eight years allowed by the statute (1) and seven years after the death of the author would have expired, unless the plaintiff had a claim as author.

On the part of the defendant it was submitted that there could be no joint authorship unless the original design was the result of a combined arrangement of the two, and that the alterations suggested by Levy and his company were of too trivial a character to make him substantially the author of any part of the drama; and also that there was no evidence of assignment.

Under the direction of the learned judge, the jury returned a verdict for the plaintiff, damages 18*l.*; being 40*s.* for each of nine representations; leave being reserved to the defendant to move to enter a verdict for him upon the question of joint authorship, the Court to be at liberty to amend and to draw inferences.

Kingdon, Q.C., in Easter Term, obtained a rule nisi.

H. T. Cole, Q.C., and *Collins*, shewed cause. That there may be copyright in additions or alterations, is clear: *Cary* v. *Longman.* (2) In *Barfield* v. *Nicholson* (3), Sir John Leach, V.C., says: "Composition is either in new matter or new arrangement." If I employ a man to write a work for me, it is my work, and no assignment or registration can be necessary to vest it in me: *Hatton* v. *Kean* (4); *Sweet* v. *Benning* (5); Copinger on Copyright, p. 44;

(1) 3 & 4 Wm. 4, c. 15, s. 1.
(2) 1 East, 357.
(3) 2 S. & S. 1, 6.
(4) 7 C. B. (N.S.) 268; 29 L. J. (C.P.) 20.
(5) 16 C. B. 459; 24 L. J. (C.P.) 175.

1871

LEVY v. RUTLEY.

or to entitle me to sue for penalties under the Dramatic Copyright Act: *Marsh* v. *Conquest.* (1) The facts clearly shew a joint authorship, so as to sustain the first count of the declaration, or an assignment sufficient to sustain the third and fourth counts. It may be conceded that mere alterations so as to improve the style of a work would not constitute a joint authorship: but here very considerable additions were made to the dialogue throughout the whole piece, and one whole scene, and a very important one, was new. The plaintiff might be sole author of part of the work and joint author of the whole. The familiar instance of Beaumont and Fletcher's plays shews that there may be joint authorship in such a production; and indeed the statute itself distinctly recognizes the rights of joint authors.

Kingdon, Q.C., and *Bullen*, in support of the rule. Two questions are presented in this case; one, whether the plaintiff was joint author of the dramatic piece in question with Wilks; the other, whether, Wilks being sole author, the plaintiff is entitled to claim as assignee of Wilks. To constitute a joint authorship, the work must be the joint design of two or more persons worked out by them in concert. There is no pretence for saying that this work was the result of a joint conception or joint design of Wilks and the plaintiff. It was the sole production of Wilks, and was delivered by him to the defendant as a complete play. The alterations or additions suggested or made by the plaintiff are not of such a substantial character as to make it a new drama. Probably no play was ever written which did not, from the taste or caprice of some particular actor, require and receive alterations; and no one ever before supposed that this would constitute a joint authorship. The alterations here consisted mainly of some vulgar excrescences to attract the attention of a particular portion of the audience; there was nothing introduced for the development of the general plot. There could be no separate authorship in the alterations: they would fall within the rule as to "confusion" mentioned in Story on Bailments, s. 40, and in the case in Popham, p. 38. In Story's Equity Jurisdiction, § 942, it is said: "In cases of invasion of a copyright by using the same materials in another work of which a large proportion is original, it constitutes no objection that an in-

(1) 17 C. B. (N.S.) 418; 33 L. J. (C.P.) 319.

junction will in effect stop the sale and circulation of the work which so infringes upon the copyright. If the parts which are original cannot be separated from those which are not original, without destroying the use and value of the original matter, he who has made the improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to another, and the mixture is forbidden by the law, he must again separate them, and bear all the mischief and loss which the separation may occasion. The same rule applies to the case of literary matter. It proceeds upon the same general principle of justice which applies to the ordinary case of a confusion of property by premeditation or wanton impropriety."

[MONTAGUE SMITH, J. The case made against you here is, that the alterations were made with the assent of Wilks.]

Then, the receipt did not operate as an assignment; it was nothing more than an executory agreement to assign upon a condition which was never performed. A mere *contract* for payment is not sufficient to vest the copyright in the proprietor of a periodical, under 5 & 6 Vict. c. 45; there must be actual payment: *Richardson* v. *Gilbert.* (1) And a receipt for the purchase-money was held in *Lover* v. *Davidson* (2) to be no evidence of an assignment.

BYLES, J. In this case Lawrence Levy is the sole plaintiff; and the declaration in the first count alleges that Levy was the proprietor of and had the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment in the United Kingdom, &c., a dramatic piece called "The King's Wager, or The Camp, the Cottage, and the Court," to wit, as *joint author* thereof; which dramatic piece had been and was composed after the passing of 3 & 4 Wm. 4, c. 15 (the Dramatic Copyright Act), by the plaintiff and one Wilks. It then alleges that the defendant, in violation of the right of the plaintiff "as such joint author as aforesaid," wrongfully represented and caused to be represented the said dramatic piece; whereby he incurred certain penalties under the Act.

(1) 1 Sim. (N.S.) 336. (2) 1 C. B. (N.S.) 182.

1871

LEVY v. RUTLEY.

The plaintiff is thus alleged to be *joint author* of the piece with Wilks. He cannot maintain the action on the first count unless he is so. Now, the evidence was that Wilks was the writer of the whole play with the exception of one scene, of more or less merit; and this scene, and a few alterations and additions in other parts of the piece, were the production of the plaintiff, or were written by others at his suggestion. The plaintiff was, therefore, the contributor of a very small part of the entire piece at a subsequent time. If the piece had been originally written by the plaintiff and Wilks jointly, in prosecution of a preconcerted joint design, the two might have been said to be co-authors of the whole play, notwithstanding that different portions were respectively the sole productions of either. But the consequence of holding this action, on the first count, to be maintainable, would be that so many persons as may have contributed separate scenes or portions of a dramatic piece might each have separate and concurrent actions for penalties against a person who may have represented the whole or particular parts of it, without any means on his part of knowing that there was a plurality of authors, or who they were.

As to the count on which the plaintiff claims as assignee, the memorandum on the receipt by Wilks did not purport to convey his legal interest, and conveyed no equitable interest; for, it was an executory contract, on a condition never performed.

On these short grounds I think our judgment should be for the defendant.

KEATING, J. I am of the same opinion The question is reduced simply to this: whether it was proved at the trial that the plaintiff was joint author with Wilks of the dramatic piece, the piratical representation of which is complained of. I say that is the sole question, because Mr. Cole scarcely attempted to support his claim upon the counts in which the plaintiff claims as assignee of the sole author. The receipt never could seriously have been set up as an assignment; as pointed out in argument, it was a mere acknowledgment of the payment of money, and perhaps an undertaking to assign upon a condition which was never fulfilled. The question for us to consider is, therefore, whether the plaintiff has proved that he was joint author of this play with Wilks. I am of opinion that

he has failed to do so. I entirely agree with my Brother Byles that, though it may not be necessary that each should contribute the same amount of labour, there must be a joint labouring in furtherance of a common design. All that the plaintiff has done is this: Wilks having written a dramatic piece complete, the plaintiff thinks it might be made more attractive; and accordingly he, without any co-operation with Wilks, introduces a new scene, and makes various alterations and additions to the dialogue. Could the additions so made constitute him a joint author with Wilks of the whole piece? There may, no doubt, be a plurality of authors: the statute, in s. 1, dealing with the duration of copyright, speaks of "the author or authors, or the survivor of the authors." But I fail to discover any evidence that there was any co-operation of the two in the design of this piece, or in its execution, or in any improvements either in the plot or the general structure. All the plaintiff claims to have done is to vary some of the dialogue, so as to make it more suitable for his company or for his audience. If the plaintiff and the author had agreed together to rearrange the plot, and so to produce a more attractive piece out of the original materials, possibly that might have made them joint authors of the whole. So, if two persons undertake jointly to write a play, agreeing in the general outline and design, and sharing the labour of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it. But, to constitute joint authorship, there must be a common design. Nothing of the sort appears here. The plaintiff made mere additions to a complete piece, which did not in themselves amount to a dramatic piece, but were intended only to make the play more attractive to the audience. I think there was no evidence to sustain either of the counts, and that the rule to enter a verdict for the defendant should be made absolute.

MONTAGUE SMITH, J. I am of the same opinion. The 3 & 4 Wm. 4, c. 15, s. 1, gives the sole liberty of representing or causing to be represented at any place of dramatic entertainment, to the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment; and the penalty for infringement of that right is to go to the author of the dramatic piece or to his

1871

LEVY v. RUTLEY.

assignee. The first point taken by Mr. Cole entirely fails. He contended that the plaintiff, having employed Wilks to write this play, might be considered the author or proprietor. That, however, is answered by *Shepherd* v. *Conquest*. (1) The way in which the case was ultimately presented, and as it stands upon the pleadings, rests the plaintiff's claim on his being joint author of the piece with Wilks, and on his having survived Wilks. The question is, has he proved his title to be considered joint author with Wilks. The facts being referred to us to draw inferences, the proof fails to satisfy my mind. There may be a difficulty in some cases in determining who are joint authors. But I take it that, if two persons agree to write a piece, there being an original joint design, and the co-operation of the two in carrying out that joint design, there can be no difficulty in saying that they are joint authors of the work, though one may do a larger share of it than the other. It is not pretended here that there was any original joint design. Wilks was employed by the plaintiff to write the play. Wilks invented the plot and wrote the whole dialogue complete. The plaintiff and some members of his company thought the play might be improved. Accordingly, the plaintiff either himself wrote or procured some one else to write for him a new scene, and made several other alterations in the incidents and in the dialogue: and the question is whether that constituted the plaintiff a joint author of the play with Wilks. The plot remains. The additions do not disturb the drama composed by Wilks: they were made for the mere purpose of improving or touching up some of its parts. It would be strange indeed, if not unjust, if the author's rights could be thus merged into a joint-authorship with another. There are probably very few instances,—at least in modern times,—of a play being put upon the stage without some alteration by the manager. It is, no doubt, difficult to draw the line: but it never could be suggested that, when an author submits his manuscript to a friend, and the friend makes alterations and improvements, the latter would thereby become a joint author of the work. If, when the piece was brought to the plaintiff, he had said to Wilks, "This thing requires to be remodeled, and you and I will do it together," and Wilks had

(1) 17 C. B. 427; 25 L. J. (C.P.) 127. 2 Jur. N.S. 286

assented, possibly a case of joint authorship might have been set up. But the evidence here falls very short of that. Great reliance was placed upon the receipt signed by Wilks. But I think, as we are sitting here as judges of the fact, we may look at the circumstances under which that receipt was given; and, regard being had to the way in which that receipt was obtained, it does not to my mind afford satisfactory evidence to outweigh the real facts and to lead me to the conclusion that the plaintiff and Wilks were joint authors, when it is plain upon the facts that they were not so. That receipt would clearly not amount to an admission which would be binding as against third persons in an action upon a statute of a somewhat penal nature. If the rights of the author may be affected by such a document as this, the consequence might be an inconvenient multiplication of rights and remedies, which never could have been contemplated. Undoubtedly the statute does contemplate the existence of joint authorship, and gives certain rights to the survivor. But the terms in which those are given shew that the legislature had in view joint authorship of an entire dramatic piece, not separate interests in parts of a piece,—a joint tenancy, so to speak, in the entire work. The plaintiff here puts his title as joint author and survivor. Having failed to prove that title, the judgment must be against him on that part of the declaration. And, there being no evidence of title as assignee, he fails also on the remaining counts.

Rule absolute. (1)

Attorney for plaintiff: *S. N. Cooper.*

Attorney for defendant: *Charles Ford, for R. W. Ford, Portsmouth.*

(1) The question of joint-authorship of a dramatic piece came under consideration in a case of *Shelley* v. *Ross*, tried before Hannen, J., in the Bail Court, without a jury, on the 7th of June, 1871. The circumstances of that case were very similar to those of the principal case; and the learned judge distinctly laid it down that alterations in a dramatic piece, for the purpose of rendering it more attractive or better adapted for stage representation, did not constitute the person making them a "joint author."

1871
June 16.

[IN THE EXCHEQUER CHAMBER.]

MELSOM *v.* GILES AND WIFE.

Will—Construction—Accruing Share—Specific Devise.

A testator devised a freehold estate to his son John for life, and after his death to his child or children, if any, in fee; "but, in case my said son John should die without lawful issue, then unto and equally between my sons George and Robert, in the same manner as the estates herein devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned, in case my said son John should leave a widow."

He then devised separate freehold estates to his sons George and Robert in precisely similar terms, mutatis mutandis. Then followed the proviso referred to, in each of the above devises,—"Provided that, in case any or either of my said sons should depart this life leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying, unto his widow and her assigns, for life."

The testator died in 1843. Robert died a bachelor in 1848. John died in 1861, and George in 1867, each leaving a widow, but no children:—

Held, by Bramwell, Channell, Pigott, and Cleasby, BB.,—reversing the judgment of the Court of Common Pleas,—that the limitation to the widows included only the shares originally and directly devised to John and George:

Held, by Kelly, C.B., and Blackburn and Mellor, JJ., that the limitation to the widows included the shares accruing to John and George on the death of Robert, as well as the shares originally and directly devised to John and George.

ERROR upon a judgment of the Court of Common Pleas, in favour of the defendants, on a special case. (1)

The case was argued in the Exchequer Chamber on the 11th and 12th of May, 1871, before Kelly, C.B., Bramwell and Channell, BB., Blackburn and Mellor, JJ., and Pigott and Cleasby, BB., by

Garth, Q.C. (*J. C. Mathew* with him), for the plaintiff, and

Manisty, Q.C. (*Murch* with him), for the defendants, who referred to 1 Jarman on Wills, 3rd ed. p. 710; 2 Ib. 661; *Doe* d. *Woodall* v. *Woodall* (2); *Re Palmer*. (3)

Cur. adv. vult.

June 16. The Court differing in opinion, the following judgments were delivered:—

CLEASBY, B. I shall say but few words in this case, because my

(1) Law Rep. 5 C. P. 614. (2) 3 C. B. 349.
(3) 3 H. & N. 26.

1871

MELSOM v. GILES.

Brother Bramwell has allowed me to see his written judgment, and I agree in the conclusion arrived at by him, and in the reasons given, particularly as to the proper meaning of the words "same manner" in the devise over.

After reading the will through, the general scheme of it (I am using an expression often used before) appears to me to be as follows:—The testator, having three sons, divides his property between them; and he devises particular properties by description to each of them. It would, I think, be quite correct language to say that he devises specified estates to each of them. I am quite aware that, by using the word "specified," I may be said to decide the whole question; but I am using the word without reference to any effect which it may have upon the conclusion to be arrived at, but as properly descriptive of what is done. The lands are particularized and described,—not an unusual meaning of the word "specified;" and they become by this description John's land, George's land, and Robert's land. The testator does not, however, give it to the sons absolutely, but to each for his life, and to the children afterwards; so that, if events had taken what may be called their natural course, there would have been the three estates in the three families, and all certain, or (technically speaking) vested estates, at the death.

But some provision must be made for the widows of the sons in case they survived their husbands; and therefore by a proviso which treats this as a contingency (though, of course, the estate is vested at the death), he gives to each, in case she survives her husband, a life-estate in the property specifically devised to her husband.

In order to keep up the devise of his property between the three sons, and to prevent the property devised to one, if that one died not leaving issue, from going all to the elder one of the other two, he gives in that event the property of the one so dying between the other two, in the same manner as he gave the particular estate to each of them. But this is dealing with a contingency which has no reference to the time of each widow becoming entitled to her life-interest in possession. I can see plainly that the testator intended to postpone the interest of the children to the interest of the widow in the property which would in the ordinary course

1871

MELSOM v. GILES.

come to her upon the death of her husband; but I cannot see that the testator intended to postpone the children's interest in property which might not come to that family for twenty or thirty years after the death of the husband.

The effect of construing the will as I do would be to give to each widow from the death of the testator a certain interest for her life in specified property, in case she survived her husband; the effect of the other construction would be to give to the widow of each a certain interest in the estate of each, and in addition a contingent interest in remainder after the death of the other widows, in half of each of the other estates. At the same time, the effect of the construction which I have adopted would certainly be in a particular event, viz. that of one son dying and leaving neither widow nor children, to give to a surviving brother an interest for his life in property to which his wife, if she survived him, would not succeed. The children, in that event, would succeed at once, upon their father's death, to that portion of the estate enjoyed by him.

As I am dealing with the proper meaning of the word "specifically," which is not a matter of strict legal construction, I am entitled to take the above matters into consideration; and I am certainly disposed to give to the word the meaning above indicated, and to make it refer to that which has been specified or particularized or described as the property of John, and George, and Robert respectively, and which in any event must become theirs if they survive the testator, and not to make it apply to that which has been given, not by particular description, to each, but by reference only to the devise to the other, and which can only become his upon a contingency more or less unlikely. In the contingent devise over the property is not particularized or described.

I do not intend by any means to say that I consider the case a clear one; but, there being a difference of opinion in the Court below and also in this Court, and being bound to give my own opinion, I have given effect by my judgment to the conclusion which appears to me to be the better of the two as regards the proper effect of the word "specifically,"—a conclusion which has the advantage of giving to each widow a fixed and certain, and not a varying and uncertain, interest.

1871

MELSOM v. GILES.

PIGOTT, B. (1) The question in this case is, whether the defendant, who is the widow of the last surviving son of George Melsom, the testator, is entitled under his will to the share which accrued to her husband George Melsom, jun., on his brother's death, in addition to the original share which he took in the first instance under that will.

This depends, in my opinion, on the construction we ought to place upon the proviso of the will, which is in these words:—"Provided that in case any or either of my said sons should depart this life leaving a widow, then I give the hereditaments and premises so *specifically devised* to such one or more of them so dying, unto his widow and her assigns for and during her natural life."

The devises to the three sons were in precisely similar forms. The testator first gave lands to his son John for life, and, after his decease, equally between all the children of his son John, as tenants in common in fee. But, in case John shall die without issue, then equally between his sons George and Robert, *in the same manner* as their estates are limited to them respectively. The estates to George and Robert were in similar terms, with similar limitations. Then followed the one proviso applicable to the widows of all the sons, as above stated.

Having regard to the language and the whole context of this will, I am of opinion that the widow of George takes under this proviso only the land which was in the first instance and directly given to her husband, and not that which accrued to him by the contingency of his having outlived his brother.

It is our duty, in construing a document, to determine its meaning by giving the natural and ordinary construction to its language, and, where it is capable of it, giving a meaning to all the language employed, unless from the context it be apparent that there is a redundancy of expression, or unless such construction would lead to manifest injustice or absurdity. We must, therefore, see in what sense the words "specifically devised" are employed, because the widow is to take only the hereditaments specifically devised to her husband.

The testator was not likely to contemplate the events which have occurred; and the language he has employed is not technical, but

(1) This judgment was read by Channell, B.

1871

MELSOM v. GILES.

popular. It would be a mistake to attempt to apply to a will so framed a merely technical construction; certainly it would be very little likely then to carry out the testator's intention. Now, I find that the testator has in the devise to each son specified and enumerated certain lands which he is primarily to take; and then has given the same lands over by way of remainder to the surviving brothers, in the event of any son dying without issue.

The words "specifically devised" thus become tolerably plain, and the testator by the use of them is distinguishing between the lands specifically and directly devised and those only contingently and generally given in remainder.

The difficulty suggested in the argument arising from the devises over being limited "in the same manner" as the estates directly devised, does not appear to me to throw doubt upon the testator's meaning in the proviso. These words are satisfied without drawing the proviso into the limitations; and I think, having regard to their position in the will, and to the whole context, it is as if the devise over were to the survivor in the same manner as the estates thereinafter devised are limited to them respectively, but irrespective of the proviso in favour of widows.

I think it is clear from the form of this will, that the framer treats the proviso as if it formed no part of the limitations, but as something which is to override and displace them, if the event contemplated by the proviso should occur. Any other construction would strike out of the will a term which the testator has used, and to which I think he has attached a very definite meaning.

The result is that, in my opinion, the judgment of the Court below ought to be reversed.

MELLOR, J. (1). The question in this case arises under the will of George Melsom, the elder, who died in June, 1843, leaving three sons him surviving, viz. John, Robert, and George. By his will he devised his farm-house, malt-house, orchards, &c., at Batheaston, also one moiety of a farm called the Haugh Farm situate in the tithing of Winsley, in the parish of Bradford, in the county of Wilts, to his son John Melsom and his assigns for his life, with remainder in fee to his child and children, if more than one, as

(1) This judgment was read by Hannen, J.

tenants in common, and, if only one, then to such one child; and then the will proceeds as follows:—"And in case my said son John Melsom shall depart this life without leaving any lawful issue, then I give and devise the same hereditaments and premises unto and equally between my sons George Melsom and Robert Melsom, *in the same manner as the estates hereinafter devised are limited to them respectively;* subject, nevertheless, to the proviso hereinafter mentioned, in case my son John Melsom should leave a widow."

The testator then devised certain orchards, cottages, and gardens, and the other moiety of the Haugh Farm, to his son George Melsom, in identical terms with those used by him in the devise to John Melsom. He then devised a farm situate in the parish of St. Catherine, in the county of Somerset, to his son Robert, in identical terms with those used in the previous devises to John and George; and then follows the proviso which creates the difficulty, and it is in these words:—"Provided that, in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying, unto his widow and her assigns during the term of her natural life."

George Melsom the elder (the testator) died about the 28th of June, 1843, leaving his three sons living at his decease. Robert Melsom died on the 4th of September, 1848, not having been married; whereupon the estate devised to him immediately passed to his brothers John and George equally between them *in the same manner* as the estates devised by the testator to John and George respectively were limited by his will.

In this state of things, the question arises whether the moiety of Robert's estate which thus passed to George under the devise over on failure of issue of Robert, and his leaving no widow, can be considered as specifically devised to him, so as to give to his widow, upon his death on the 31st of August, 1867, a life-estate in such moiety, in the same manner as she took a life-estate in the property directly devised to George. We have to find the intention of the testator from the words of the will, guided by established rules of construction, so far as they are applicable to the circumstances of the case; and I agree that the rule of construction cited by my Brother Byles in the Court below requires that some indication of

1871

MELSOM v. GILES.

intention on the part of the testator should be found in the will that the widow of a deceased son should take a life-interest in the moiety which might come to him on the decease of a brother without issue and without a widow, as well as in the estate directly devised to him. I think that such indication of intention is found in the words of the devises over on the death of a son or sons without issue, that is, in the words "in the same manner as the estates herein devised are limited to them respectively."

The estate originally and directly devised to George was limited to him and his assigns for life, with remainder in fee to his child or children, as tenants in common, if more than one, and, if only one, then to such one child, with a contingent devise over in failure of his issue to his two brothers John and Robert equally between them, "*subject nevertheless to the proviso* hereinafter mentioned, in case my son George should leave a widow." The effect of this was, as I think, to limit a life-estate to the widow of George in the moiety so devised to him, "in the same manner" as the estate originally devised to George was limited. The moiety came to George by virtue of limitations precisely similar to those by which his original estate was limited. I cannot well see how the proviso operated to give a life-estate to each widow in her husband's original estate, without giving it in each moiety. The words "subject to the proviso hereinafter mentioned in case my son should leave a widow," must, I think, be read into the devise over of the moiety, so as to attach to it the same incidents and to subject it to the same limitations, provisos, and conditions, to which the estate directly devised was made subject; otherwise, full effect would not be given to the words "in the same manner as the estates herein devised are limited."

I have come to the conclusion that these are the governing words, and do bring within the effect of the proviso the entire estate which George derived under the will, either by direct devise or by virtue of the contingent devise over, and consequently that his widow upon his death took a life-interest in such entire estate.

On the other hand, it is contended on the part of the widow and representative of John, who was heir-at-law of the testator, and became entitled to all the estate of the testator as to which there was an intestacy, that the widow of George took a life-estate only

in the property directly devised to him; and, if she is right in that contention, the judgment of the Court below must be reversed, in accordance with the opinion of my brother Byles, who dissented from the conclusion of the majority of the Court.

The argument on the part of the widow of John rests entirely upon the effect of the proviso in favour of the widows of any of the testator's sons who might die leaving a widow; and it mainly depends upon the construction to be put upon the words "then I give the hereditaments and premises so specifically devised to such one or more of them so dying, unto his widow and her assigns during the term of her natural life." It is said that, by the use of the words "so specifically devised," it was intended to limit the life-estate of any widow to the property directly devised to her husband, and that it could not therefore be increased by the determination in his favour of the contingent devises over. It is further contended that the word "specifically" will have no meaning unless it have that effect, and that the disposition thus limited will amply satisfy the terms of the will.

I confess that there is some apparent difficulty in finding a meaning for the word which will reconcile it with the construction contended for on the part of George's widow; but I think that the difficulty is more apparent than real, and that the use of that word "specifically" may well be read as meaning the "specific portions" of the testator's estate which might come to her husband either directly or under the contingent devises in the will.

In the first instance, a particular property is specifically devised to each son, and, upon the happening of a certain contingency, viz. the death of a son without issue (to wit, Robert), one moiety of the estate of the son so dying is specifically devised to John, and the other to George; and in that sense the first estate and the moiety of the estate of the dead son are alike specially or specifically devised to George.

I think that the position of the proviso in the will, coming as it does after the direct devise as well as the contingent devises over, shews that it was intended to operate upon the property which the survivors or survivor of the three sons might derive under the terms of the will, as opposed to any interest which might descend to either of them by reason of a possible intestacy.

1871

MELSOM v. GILES.

The will has undoubtedly been inaptly framed, and presents no small apparent difficulty in coming to a right conclusion: but, inasmuch as I think the word "specifically" is more capable of a modified and subordinate meaning than the words "in the same manner," occurring in the contingent devises over are, I have come to the conclusion that the judgment of the Court below was right, and ought to be affirmed.

BLACKBURN, J. This case depends upon the construction of a will. The testator had three sons, John, George, and Robert; and he had three estates, which, for brevity's sake, I shall call John's land, George's land, and Robert's land.

He devises John's land to John for life, with remainder to his children in fee; and, in the event (which has happened) of John having no children, he devises John's land in equal moieties to George and Robert "in the same manner as the estates hereinafter devised are limited to them respectively, subject nevertheless to the proviso hereinafter mentioned, in case my said son John should leave a widow." The testator then, by precisely similar words, devises George's land to George for life, remainder to George's children in fee; and, in the event of George having no children (which has happened), he devises George's land to John and Robert in equal moieties, repeating the words "in the same manner as the estates herein devised are limited to them respectively, subject nevertheless to the proviso hereinafter mentioned, in case my son George should leave a widow." And by precisely similar words he devises Robert's land to Robert for life, remainder to Robert's children in fee; and, in the event of Robert having no children (which has happened), he devises Robert's land to John and George in equal moieties, repeating the words "in the same manner as the estates herein devised are limited to them respectively, subject to the proviso hereinafter mentioned, in case my son Robert should leave a widow." Then follows the proviso:—"Provided that, in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying, unto his widow and her assigns for life."

The testator does not seem to have anticipated, or at all events

has not provided for, the case that actually has happened, of no one of his three sons having children; so that the fee under these devises never vested, and consequently the fee in all three estates remained in John as his heir-at-law, subject to the life-interests created by the devises just quoted.

Robert died childless, leaving no widow; and thereupon Robert's land came to John and George in equal moieties, "in the same manner as the estates herein devised are limited to them respectively." This clearly means, as regards the moiety devised to John, in the same manner as John's land is limited, and, as regards the moiety devised to George, in the same manner as George's land is limited.

John and George both died childless, leaving each a widow; and the plaintiff, who is John's widow and also his devisee, is as such entitled to the estates, except in so far as the female defendant, who is George's widow, is entitled to a life-interest under the proviso above quoted; and the question is, whether that life-interest is only in George's land which was in the first instance devised to her husband, or extends also to the moiety of Robert's land which under the provisions of the will came to George on the death of Robert.

The difficulty arises from the testator's having made a devise by reference to a former devise, which calls on those who have to construe the will to read it as if the words referred to were repeated; for, "verba relata inesse videntur,"—a maxim which, in Broom's Maxims (5th ed.), p. 673, is, I think, accurately translated, "words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them." This is a course sometimes taken for the sake of brevity, and it too often leads to obscurity. In the present case, if the person framing the will had, instead of using the words of reference, written the devise over of Robert's land, on Robert's death without children, at length, it would have run thus:—"I give and devise one moiety of Robert's land to my son George and his assigns for life, and, from and after his decease, unto the children of my said son George in fee: but, in case my son George shall depart this life without leaving any issue, then I give and devise this moiety of Robert's land unto and equally between my sons John and

1871

MELSOM v. GILES.

Robert, in the same manner as John's land and *Robert's* land are limited to them respectively, *subject, nevertheless, to the proviso hereinafter mentioned in case my said son George should leave a widow.*"

Had this been done, the testator would not have adopted such language; for, the devise of a moiety of a moiety of Robert's land to Robert and his children, with remainder to George and his children, after Robert and George are already both dead childless, is at first view an absurdity; and though, on looking closer, it would by a series of repetitions bring first a fourth, then an eighth, then a sixteenth, and so on in an endless series, back to John and his children, and so would operate just as a simple devise of it to John and his children would have done, no one would ever with his eyes open use such a mode of expressing an intention to devise this moiety of Robert's land to John and his children. But there would have been a more important effect of writing the limitation at full length; for, when the testator came to the words which would bring in the proviso in favour of the widow of George, and apply it to the moiety of Robert's land, he would at once have had his attention called to the present question; and, if he really wished to confine the devise in favour of George's widow to a life-interest in George's land, he would have desired that the proviso should be left out of the limitations of the moiety of Robert's land to George. If, on the other hand, he wished the widow of a son dying childless to have a life-interest in all that had come to that son under his will, he would have left it as it is.

What his wishes were I have no means of knowing. I should infer, from the way in which the will is framed, that the point was not present to his mind at all. But I think that the proviso by which George's widow was to have a life-estate in George's land is a part and an important part of the manner in which George's land was limited to George; and consequently I think that, unless there be something to shew an intention to exclude that part of the limitation, the moiety of Robert's land is devised to George, subject to such proviso.

It is argued that the word "specifically," as used in the proviso, expresses an intention to confine the proviso to John's land as regards John's widow, to George's land as regards George's widow,

and to Robert's land as regards Robert's widow, and consequently to prevent the proviso from being brought into the limitations of the moiety of a son's land after his death childless. I cannot think so. The testator, or rather the person who was framing his will for him, was endeavouring for the sake of brevity to frame one proviso that would do the work of several. He uses the word "specifically," which is not a term of art, in some sense perhaps not thoroughly known to himself. I should guess that he used it as an equivalent for "respectively."

It is said that we must if possible give effect to the word "specifically," and not leave it idle: but we cannot for this purpose give it more work than the word can do. I have already intimated my belief that the point now under consideration was not present to the mind of the person framing the will; but, if it had been, I think it very unlikely that the word would have been used with the intention to give it such an extensive operation as is supposed. I certainly think that, if it was so intended, the intention is not sufficiently expressed.

I do not think that there is any good to be obtained from citing cases on such a point. All are agreed that the intention is to be collected from the words used, and that words of reference bring down the matters they refer to, as if repeated: see the cases cited in Broom's Maxims (5th ed.), p. 673. The difficulty, and it is very considerable, is, to understand the devise, when the previous limitations of George's land are brought down and read as if repeated in the latter part of the devise of Robert's land.

I think the judgment of the majority of the Court below is right, and should be affirmed.

CHANNELL, B. By the will which we have to construe in this case, the testator devised certain lands, which he particularly described, to his son John for life, with remainder in fee to the children of John as tenants in common; and, in case John should die without leaving issue, then he devised the same hereditaments and premises unto and equally between his sons George and Robert, in the same manner as the estates thereinafter devised were limited to them respectively, subject, nevertheless, to the proviso thereinafter mentioned in case John should leave a widow.

1871

MELSOM v. GILES.

The testator then devised other lands (also particularly described) to George in similar terms, mutatis mutandis; and other lands again (also so described) to Robert. After these devises comes the proviso:—"In case any or either of my said sons shall die leaving a widow, then I give the lands so specifically devised to such one or more of them so dying," to the widow, for life. All the sons have died without children, Robert dying first without a widow, and the others leaving widows.

The question we have to decide is, whether under the will these widows took a life-estate, not only in the lands immediately devised to their husbands, but also in those lands which came to the husbands under the contingent devise, upon the death of Robert without issue.

As the plaintiff, the widow of the eldest son, John, is entitled to everything as to which there is an intestacy, it happens that it is to her interest to contend that she and the widow of George took no life-interest in the lands devised in the first instance to Robert; while the defendant, who is the widow of George, on the contrary, contends that such life-interests were taken.

The will is certainly not so drawn as aptly to express an intention either way on this point; and it is impossible to doubt that the events which have happened were not in fact contemplated either by the testator or by the person who drew his will for him. We have, however, to construe the words used; and, if we can find that the words used shew an intention to give to the widows a life-estate in the lands contingently devised, we must give effect to this intention, and decide in favour of the defendant. If, however, we cannot find any such intention, or if we find, on the contrary, an intention not to create this estate, then we must decide for the plaintiff. We ought, also, in arriving at our conclusion, to bear in mind the general rule laid down in the cases collected in 2 Jarman on Wills (3rd ed.) p. 661, and Hawkins on Construction of Wills, p. 268, and referred to by my Brother Byles in the Court below, to the effect that clauses in a will disposing of the shares of devisees and legatees dying before a given period or event do not, without a positive and distinct indication of intention, extend to shares which have once accrued under those clauses, so as to pass them a second time.

1871

MELSOM v. GILES.

I am not able to find here any such indication of intention. The estates contingently devised are to go to the sons "in the same manner as the estates herein devised are limited to them respectively." Now, referring to the limitations, it is found that they are to the sons for life, with remainders to their children in fee. It is true that a proviso is found afterwards in the will which, as regards the lands directly devised to the sons, clearly has the same effect as if a limitation in remainder to the widow of each son for life had been introduced after the remainder to the children. But, although this is its effect, I do not think that it can properly be said that the proviso in favour of widows is a part of the "manner in which the estates are limited to the sons," so as to form part of the contingent devise.

In attributing a meaning to the words used we must take into consideration the place where they occur: and it seems to me probable that the reason for giving the life-estate to the widows by the proviso, instead of by a remainder introduced in its proper place amongst the limitations, was that it might not be incorporated in the contingent devise. It is said, of course, that the reason of this was merely the desire for brevity. In fact, however, three limitations to the widows for life might have been inserted with the use of as few words as are contained in the proviso. This certainly does not shew that the real object of the draftsman,—who does not appear to have been very skilful,—may not have been brevity; but, as we are bound to look at the meaning of the words he has used, we must attribute to them the meaning which in the position in which they are found they fairly bear, without speculating as to his real intention. I think, therefore, that the proviso cannot be considered as part of the limitations; and, if not, it would not be incorporated and made part of the contingent devise.

But, even if the words "in the same manner," &c., could be considered to incorporate the proviso, if the proviso itself contained nothing to shew that it was not meant to apply to the lands contingently devised, yet, if we find any words in the proviso which indicate an intention that it should be confined to the lands directly and immediately devised, then it becomes clear that it cannot be considered as incorporated.

1871

MELSOM v. GILES.

Now, on the whole, I think that the word "specifically" has this effect.

It must be remembered that the proviso, although referred to before, comes in the will after the contingent devises as well as after the direct devises. The life-estates of the widows are to be in the "hereditaments and premises so specifically devised" to the sons dying. Now, the estates directly devised clearly answer this description, as they are devised by particular description. In a certain sense, the lands contingently devised answer this description also. It must be presumed, however, that, by the expression "so specifically devised," something different was meant from "so devised." I can see no meaning which can be attached to the word "specifically," unless it is meant by it to distinguish between the lands particularly and specially devised to each son directly and those lands which were only devised contingently. It could scarcely have been meant by the use of this word to distinguish between the prior devises of lands left separately to each son and the subsequent estate in common left jointly to all the sons, as suggested in the judgment of the majority of the Court below, because that estate in common is not an estate for life only, and the proviso would be inapplicable, except where the estate of the son dying and leaving a widow was an estate for life. I agree generally in what is said by my Brother Byles in the Court below as to the use of the word "specifically" in this will.

In the present case it is clear that there is an intestacy to some extent, and the only question is, to what extent. I do not, therefore, think that the presumption against intestacy, that is to say, the presumption that the testator meant by his will completely to dispose of the whole of his property, can be introduced in this case to support the contention that the widows were intended to take a life-interest in the lands which had accrued to their husbands under the contingent devise as well as in those directly devised.

On the whole, I fail to discover any sufficient indication in the words used of an intention to create such a life-estate, and therefore I think that the claim of the plaintiff through the heir-at-law must prevail. For these reasons, I think the judgment of the Court below should be reversed.

1871

MELSOM v. GILES.

BRAMWELL, B. (1). In this case we have to consider whether the testator has used words which give a life-estate to the widows in the moieties of the estates of their husbands' brothers who die childless. We are not to assume the testator had an intention on the subject; for, he may have had none. Or he may have had an intention and not expressed it, or not had and yet have used words as though he had had an intention on the subject. Now, the words relied on by the widow are, that the gifts over to the brothers of a brother dying childless are "to my sons A. and B. in the same manner as the estates hereinafter devised are limited to them respectively, subject to the proviso hereinafter mentioned, in case my son C. should leave a widow." It is said that the *manner* in which the estates devised are so *limited* to A. and B. is, a limitation to each for his life, with remainder to his children, with a proviso for an estate for life to his widow. But that proviso seems to me no part of the *manner* in which the "estates hereinafter devised are *limited* to them respectively," it is not a part of, but a proviso on, the *manner* in which the estates are limited to them. The words, to have the effect contended for, should have been "in the same manner as the estates hereinafter devised are limited to them in respect and *subject to the same proviso*,"—"subject, nevertheless, as to this devise to C., to the proviso hereinafter mentioned, in case my son C. should leave a widow." Suppose that (without a ruthless dislocation) the form had been, "And in case my son C. should depart this life without leaving any lawful issue, then, subject to the proviso hereinafter mentioned, in case my son C. should leave a widow, I give the same premises unto and equally between my sons A. and B. in the same manner as the estates hereinafter devised are limited to them respectively,"—would it not have been right to have added, "and subject to the said proviso, in case they or either of them should leave widows or a widow?" In other words, it seems to me that this reference to the general proviso in favour of the widows, and the general proviso itself, should be read in the same way as though the proviso was specially stated in each devise after the devise of the remainder to the children of the particular son,—that the general proviso is no more than a particular proviso on each devise to a

(1) This judgment was read by Cleasby, B.

1871

MELSOM v. GILES.

son, with remainder to his children. It is certain that the contrary construction gives no effect to the words "*specifically* devised to such one or more." But this does; for, the words are, "In case any or either of my said sons shall depart this life leaving a widow, then I give the premises so specifically devised to such one or more of them so dying, unto his widow," &c.; that is to say, in case any one son shall depart this life leaving a widow, then I give the premises so specifically devised to such son to his widow for life, and, if more than one shall so die leaving widows, then I give them life-estates *respectively* in the premises specifically devised to their husbands *respectively*.

I have tried to consider what was a likely disposition for the testator to make. On the one hand it may be said, if a brother dies childless and with no widow, and the other brothers take life-estates in the estate of the deceased brother, why should not the widows of the surviving brothers be as well off as their husbands? On the other hand it may be said, A. dies leaving a widow and children, she takes a life-estate in the land specifically devised to him; then B. dies childless and widowless; A.'s children take a moiety of B.'s share; but, why should the widow of A. be indowed, i.e. take a life-estate, in land her husband never had?

Other difficulties may be put on either side; but it seems to me to be no use to do so; there being no reason to suppose the testator contemplated remote contingencies; it not being even certain that he contemplated that one which has happened, though I think he did, and meant that the widows should not take life-estates in more than the premises devised absolutely to their respective husbands.

I think the judgment should be reversed.

KELLY, C.B. I am of opinion that the defendant is entitled to the judgment of the Court.

George Melsom, the testator in this case, had three sons, John George, and Robert. By his will, made in 1842, he devised certain real estates to each of his three sons and their children; and the three devises are in much the same language and to the same effect; and each was subject to a proviso in favour of the wives of the sons, in case they should survive their respective husbands.

1871

MELSOM v. GILES.

Each of these devises was, in effect, of certain lands to the three sons and to their issue respectively, with a further devise that, in case such sons respectively should die without issue, the property should pass, in equal moieties, to the two surviving brothers, and with a proviso applicable to each of the three, giving a life-estate to his widow: and the question in this case is, whether that proviso,—which I will call the widows' proviso,—gives to the widow of the second son, George, a life-interest in the moiety of the property devised to Robert, who died without issue, leaving his brothers John and George him surviving.

The devise to John, the eldest son, was in these terms:—"I give and devise" certain lands described, and which I will call Whiteacre, "unto my son John Melsom and his assigns for his life, and, from and after his decease, unto and equally between all and every the child and children of my said son John if more than one, their several and respective heirs and assigns, as tenants in common, and, if but one, then to such one child, his or her heirs and assigns for ever; but, in case my said son John shall depart this life without leaving any lawful issue, then I give and devise the same hereditaments and premises unto and equally between my sons George and Robert, in the same manner as the estates hereinafter devised are limited to them; subject, nevertheless, to the proviso hereinafter mentioned, in case my said son John should leave a widow."

Then follows a devise of Blackacre to the second son, George, for life, with remainder to his children in fee, and with the like conditional devise, in case of his death without issue, to John and Robert respectively, and subject also to the widows' proviso, in case his son George should leave a widow. And, lastly, there is a devise of Greenacre, in exactly the same terms, to Robert and his children, with the conditional devise over to John and George, in case he should die without issue, and also subject to the widows' proviso. Then follows that proviso, in these terms:—"Provided that, in case any or either of my said sons shall depart this life leaving a widow, then I give the *hereditaments* and premises *so specifically devised* to such one or more of them so dying unto his widow and her assigns during the term of her natural life."

I may here at once observe that I think the word "*heredita-*

1871

MELSOM v. GILES.

ments" means "*all hereditaments*," and that "*specifically*" means *specified*, and so applies as well to *the moieties* as to the hereditaments originally devised, and distinguishes between the property therein *named and specified* and that which is the subject of the general devises and bequests with which the will concludes.

The will then further contains, first, a devise and bequest of certain leasehold messuages and certain houses and lands described, equally between the three sons John, George, and Robert, as tenants in common, their several and respective heirs, executors, and assigns; and then a bequest of the rest, residue, and remainder of the testator's personal estate to the three sons in equal shares and proportions, their several and respective executors and administrators.

Robert, the third son, died in 1848, unmarried and without issue. John died in 1861, leaving a widow, the present plaintiff, but no issue. George died in 1867, leaving a widow, but also without issue.

The question in this case is, whether the defendant, the widow of George, but who has now become the wife of the co-defendant, Giles, is entitled to a life-interest, not merely in Blackacre, originally devised to her husband, but also in a moiety of Greenacre, which had passed to her husband, George, upon the death without issue of his brother Robert.

Before I refer to the words of the proviso, and its effect upon the disposition of the moiety of Robert's estate, it is necessary to consider a point which has been referred to during the argument, but upon which the counsel upon neither side have expressed an opinion or founded an argument; the question, namely, whether upon the death of Robert without issue, a moiety of Greenacre passed only to each of the two surviving sons respectively for life, or whether the words of the devise give also a remainder in fee to their children. This depends upon the meaning and effect of the words "in the same manner as the estates herein devised are limited to them respectively." Undoubtedly the sons alone are mentioned; but, as the remainders upon the determination of their life-estates are not specifically or expressly disposed of, and there is no reason from the general tenor of the will to suppose that the testator intended to die intestate as to any part of his property,

and as there is no residuary clause as to his real estate, I am of opinion that each of the surviving sons, John and George, took an estate for life, with a remainder in fee to their children, they could not otherwise take in the same manner as the estates before devised were limited to them, inasmuch as those estates were expressly devised to them for life, but with remainder to their children. This brings us to the consideration of the general intent of the testator, to be collected from the entire will.

It should seem that the testator desired that his property should be equally divided amongst his three sons, and that, in the event of one or more of the three dying without issue, his share, or the property originally devised to him, should pass to and be equally divided between the survivors and their issue; otherwise, the survivors might each take an estate for life, and the remainders in fee, being undisposed of, would pass to the heir-at-law of the testator, the eldest son, John, whom there is nothing in the will at all tending to shew that he had any wish or intention to prefer to the others. And, if this be so, is it not equally clear, that, inasmuch as each successive devise to each of the sons respectively, both of the properties originally devised and of the moieties upon the death of one without issue, is made subject to the widows' proviso, he intended the widow of every one of the sons who should leave a widow to take a life-interest in the whole of one son's share, which comprised not only the originally-devised property, but the subsequently-devised moiety?

But, to come at once to the words of the proviso, and avoiding hypothetical cases, but dealing with the facts as they have actually occurred in the case now before the Court, let us look to the effect of the clauses which have thus actually come into operation. These words are, "but, in case my son Robert shall depart this life without leaving any lawful issue, I give and devise Greenacre unto and equally between my sons John and George;" that is, in other words, upon the event which has occurred, I give one moiety of Greenacre to my son George, and, upon the construction above pointed out, I give one moiety of Greenacre to my son George for his life, remainder to his children in fee. Then follow the words, "subject, nevertheless, to the widows' proviso, that is to say, that, in case my son George should leave a widow," then, adopting the

1871

MELSOM v. GILES.

precise words of the widows' proviso, "I give the hereditaments and premises so specifically devised to my son George, unto his widow and her assigns for the term of her natural life."

This is, then, the way in which the will would stand, putting all these clauses together, the widow therefore expressly taking and becoming entitled to a life-estate in the premises so specifically devised to her husband, the second son, George.

It has been argued for the plaintiff that the word "specifically" limits the proviso to the premises or property originally devised, and excludes the moiety subsequently devised, and which passed to George and his children upon the death of Robert without children. But, let us suppose, first, the word "specifically" had been omitted, and the clause had stood "I give the hereditaments and premises so devised to my son George," and these words coming after the devise not only of Blackacre but also of the moiety of Greenacre which had been unquestionably devised to George, there could have been no doubt but that the life-estate so given to the widow in the hereditaments and premises so devised would apply to and include the moiety of Greenacre, as well as the entirety of Blackacre. But, as we find the word there, we must put some construction upon it, and it must be construed according to its legal or to its natural and ordinary signification.

Now, it has been laid down that every devise of land is a specific devise. If, therefore, we are to take strictly its legal signification, it would apply as well to the moiety as to the entirety devised. And, how does its natural differ from its legal meaning? It should seem to mean a devise or devises made in express and specific terms. And the devise of Robert's moiety is as much a specific devise as that of George's entirety. If we are bound to put a construction on it with reference to the tenor of the entire will, it may not unreasonably be said that it was introduced to distinguish the specific and express devises of the entirety of the one property and the moiety of the other from the more general devises and bequests of the property comprised in the last two clauses of the will, and devised and bequeathed in general terms to be equally divided among the three sons, their heirs and executors. Following, therefore, the effect of the definite provision in relation to the property passing to the son George throughout each of the clauses in succes-

sion, in order to put a construction upon the words "in the same manner as the estate herein devised," it seems to amount to this, that Blackacre being devised to George for life, with remainder to his children in fee, and the moiety of Greenacre being devised to George for life, with remainder also to his children in fee, but both being subject to the proviso that in case he should leave a widow she should be entitled for life to the property so devised; the making these devises subject to the proviso is as much a part of the manner in which the one property and the other are devised to George, as is the devise of both properties to his children in fee. It cannot, therefore, be otherwise read, giving effect to the whole of the words used, than as a devise of the one property and the moiety of the other to George for life, remainder to his widow for life, remainder to his children in fee.

I am of opinion, therefore, that the defendant, the widow of George, is entitled to a life-estate in Robert's moiety, as well as in the property originally devised to her husband, George, and consequently that the judgment of the Court of Common Pleas should be affirmed.

The majority of the Court, however, being of a contrary opinion, the judgment of the Court of Common Pleas will be reversed.

Judgment reversed.

Attorneys for plaintiff: *Young, Jones, Roberts, & Hall.*
Attorneys for defendants: *Routh & Stacey.*

1871
June 10.

IN RE JOHN GRAHAM PARKINSON AND THE GREAT WESTERN RAILWAY COMPANY.

Railway and Canal Traffic Act (17 & 18 *Vict. c.* 31)—*Undue Preference and undue Prejudice.*

The Great Western Railway Company had an office at Cirencester for the reception of goods to be carried by them on their railway, and an agent there to whom goods arriving at the station addressed to persons residing in Cirencester were intrusted for delivery on account and for the profit of the company. The complainant, a common carrier at Cirencester, complained that the company refused to recognize or act upon general orders signed by the consignees of goods, directing the company to hand over to him (the complainant) for delivery all goods which might arrive at the Cirencester station addressed to such consignees; but that they required him (the complainant) to produce on each occasion a special order describing the particular goods which the consignees desired to have delivered to them by him; no such special (or any) orders being required from their own agent:—

Held, that this was ground for an injunction under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), s. 2, it being an undue and unreasonable prejudice to the complainant in the conduct of his business of a carrier, and an undue preference and advantage to the company themselves.

RULE obtained on behalf of J. G. Parkinson, a common carrier, calling upon the Great Western Railway Company to shew cause why a writ of injunction under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), should not issue injoining them to desist from giving themselves and certain carriers an undue advantage, and from subjecting the complainant to undue and unreasonable prejudice, and to afford him reasonable facilities for the receiving and delivering of traffic conveyed by their railway, by recognizing and acting on all general orders from consignees of goods for delivery of goods to the complainant at the Cirencester railway-station, with costs.

The grievance of which Mr. Parkinson complained was, in substance, that, although a number of traders in Cirencester and its neighbourhood had lodged with the company general orders or authorities for the delivery to him of goods arriving at the Cirencester station consigned to them, the company, with a view of securing to themselves the profit derived from the cartage of such goods to their destination, refused to recognize or to act upon such general orders, but required Parkinson to produce a special order

in each case describing the particular goods to be handed over to him for delivery.

The material parts of the affidavit of Parkinson, used on the argument of the rule, were as follows :—

1. On the 29th of April last, my attorneys wrote and sent to the general manager of the company a letter, as follows :—" . . . . in order that there may be no misapprehension as to the ground of Mr. Parkinson's complaints, we beg to state, in further explanation of our letter of the 15th of February last and the 5th instant, first, that Mr. Parkinson complains of the refusal of your officers at Cirencester station to deliver to him the goods of Messrs. Parry & Son and of those other traders who have lodged or may lodge general authorities for that purpose. We are instructed to point out to you that your officers do not require any other carrier to furnish written orders from consignees specifying the particular goods to be delivered, and that, especially with reference to Mr. Budd and the country carriers, no order of any kind, written or verbal, general or specific, is required . . . . . ."

2. On the 8th of May, instant, Mr. Grierson, the general manager of the company, sent the following reply :—" First, with reference to Mr. Parkinson's complaint of the refusal of the company's officers to hand to him at Cirencester for delivery the goods of Messrs. Parry & Son and other traders who have lodged or may lodge general authorities for that purpose, that it is not the practice of the company to accept or act upon any general orders or authorities from consignees for the delivery of goods in Cirencester ; but, on the contrary, they require all carriers, and persons acting in a similar capacity to, and carrying on their business in the same way as, Mr. Parkinson, to furnish written orders from the consignees properly specifying the particular goods which the consignees desire to be delivered up by the company to the person applying for the delivery. The company not only carry on at Cirencester the ordinary business of a railway company, but also that of common carriers, and incidentally thereto undertake the collection and delivery of goods in the town, and have an office there.

" Mr. Budd, as your client must be aware, is employed by the company as their sole agent for the collection and delivery of all goods which the company undertake to collect or deliver in Cirencester, and also for the collection there on their behalf of moneys due to the company for the carriage and collection and delivery of goods. He also keeps for them the above-mentioned office in Cirencester, answers inquiries for them, and attends to their general business, and renders them various other services. Mr. Budd, therefore, is a member of the company's staff, and in fact their servant, and acts under the directions of the company, and is subject to their immediate control, and moreover undertakes and is responsible to them for the due and safe collection and delivery in Cirencester of goods which the company are bound to collect or deliver there as common carriers. These arrangements with Mr. Budd are essential and necessary for the efficient and proper management of the company's traffic and the proper and speedy collection and delivery of the goods, and conduce greatly to the advantage and convenience of the public.

" With respect to the country carriers, the company's practice at Cirencester is simply to hand over to the proper country carrier for further conveyance, in accord-

1871

PARKINSON v. GREAT WESTERN RAILWAY CO.

ance with the addresses on the goods, goods addressed or consigned to places beyond the limits of the company's delivery at Cirencester, and those goods only. The position of the country carriers is not in any respect analogous to that of your client; and no preference is given to them: the goods handed over to them are all destined to places beyond the limits of the company's delivery, and are so handed over in pursuance of the duty of the company as common carriers and the directions of the consignors . . . . ."

5. It is not true, as stated in that letter, that it is not the practice of the company to act upon general orders, but that the company require all carriers and persons carrying on their business as I do, to furnish written orders from the consignees properly specifying the particular goods which the consignees require to be delivered up by the company to the person applying for the delivery. The company do not require any other person than myself to furnish such written orders, as alleged.

6. There are, with the exception of James Short, only two carriers at Cirencester, whose business is carried on within the company's limits of delivery, viz. Budd and myself, I being also agent of Pickford & Co. The company do not require Budd to furnish any orders whatever from the consignees of goods, either written or verbal, general or specific; but they do require me to furnish written orders specifying the particular goods.

7. Short carries on a small business as a carrier between Cirencester station and Stratton, which is within the limits of the company's delivery, and he is from time to time allowed to deliver goods at Stratton, without any order from the consignees; and in particular he from time to time so delivers goods consigned to one Webb, of Stratton. On the 3rd of May, instant, Webb gave the company an order or authority, as follows:—"Please deliver to Mr. Parkinson, at the Cirencester station, all goods that may arrive consigned to me." On the same day I applied to the station-master at Cirencester station to know whether the goods which might arrive at that station consigned to Webb would be handed to me for delivery, pursuant to the order; and I was distinctly informed that they would not be, and that such order would not be recognized or acted upon.

8. It is true that Budd is the agent of the company: but, by being myself required to furnish particular orders for the delivery of goods as aforesaid, whilst Budd is allowed to deliver goods without any order or authority from the consignees whatever, I am subjected to an undue and unreasonable prejudice and disadvantage; and such prejudice and disadvantage is the same, so far as I am concerned, whether Budd is a common carrier to whom a preference is given in regard to the requirement of such orders, or whether he is the agent only of the company, in which case the like preference is given to themselves in their capacity of common carriers, to my prejudice and disadvantage.

9. The requirement of particular orders is, I verily believe, made upon me with the knowledge and intention that it should, as in fact it does, operate as an impediment in the way of the successful carrying on of my said business, and to insure a monopoly of the carrying business within the town of Cirencester and its neighbourhood to Budd, either on his own account or as the agent and for the benefit of the company.

11. General orders or authorities would impose no difficulty or inconvenience upon the company; but great inconvenience is imposed upon the servants of the company, the carriers, and the public, by requiring a particular order in each case.

The material parts of the affidavit of the company's district goods manager, in answer, were as follows:—

6. The company insist upon delivering goods in accordance with the addresses affixed thereto, or in accordance with the express directions given by the consignors to the company at the time of the making of the consignments, and refuse to act upon general orders of the consignees for delivery thereof.

7. It would cause great trouble, public inconvenience, and delay, if the company were to act upon general orders or authorities for the delivery of goods; and such a practice would seriously interrupt the company in carrying out their contracts for the due delivery of goods, and otherwise in carrying on their business, and would greatly increase the risk of loss and the responsibilities of the company as carriers, and especially in this, that it would necessitate the keeping by the company of extra books and a record of such general orders, also a reference to such orders on the arrival of each consignment; and there would be difficulty in identifying the particular consignee with the party giving the general order, especially where there are different traders of the same name.

The affidavit also contained a general denial of any intention on the part of the company to prejudice or annoy Parkinson in his business.

Manisty, Q.C., and *J. Digby*, shewed cause. It is not every preference or every prejudice that is the proper subject of an application for relief under this statute: to entitle a party to complain, it must be shewn that the preference or the prejudice suggested is undue, and intentionally given or inflicted. To judge of this, regard must be had to all the surrounding circumstances, not forgetting the fair interests of the company: *Nicholson* v. *Great Western Ry. Co.* (1); *West* v. *London and North Western Ry. Co.* (2); *Palmer* v. *London and Brighton Ry. Co.* (3). The complaint here is, that the company refuse to deliver at their station at Cirencester to the complainant goods arriving there consigned to persons residing in the town and neighbourhood, without a special or particular order or authority for that purpose, and that they will not recognize or act upon a general order or authority applicable to all goods coming there consigned to those persons. It is obvious that it would be impossible for the company to carry on the business of railway carriers at all, if their servants are bound to attend to all these general orders. Such orders may be and often are signed by large numbers of persons, requiring that all goods addressed to any one of them should be delivered to the complainant. To require the company to obey such an order

(1) 5 C. B. (N.S.) 366; 28 L. J. (C.P.) 89.

(2) Law Rep. 5 C. P. 622.

(3) Ante, p.194.

1871

PARKINSON v. GREAT WESTERN RAILWAY CO.

would be imposing upon them an enormous risk; for, they would be liable to the consignors if the goods were delivered to a stranger: *Stephenson* v. *Hart.* (1) The difficulty and delay which would result from requiring the servants of the company to compare the address upon each parcel with the orders deposited with them, in order to see whether the goods are to be delivered in ordinary course to the consignee or to some carrier named by him, would not only be injurious to the company but also most inconvenient to the public.

[WILLES, J. The complaint is, that the company require more formalities from the complainant than they do from their own agent, and so impose an undue prejudice upon him in the exercise of his business of a carrier.]

All the cases shew that the reasonable convenience of the company is to be consulted as well as the convenience of the public: and it is for the Court to say whether the course laid down by the company for the conduct of their traffic is not such as best to secure both. Seeing that there is no appeal, a clear case should be made out for the extraordinary interference of the Court in favour of a private individual.

H. James, Q.C., and *Lord*, were not called upon.

WILLES, J. The conclusion which I draw from Mr. Grierson's letter is that justice requires that this rule should be made absolute; and I feel it to be quite unnecessary to refer to any affidavit. In that letter, the company's district manager has laid down clearly what the company mean to do. It appears that a claim was made by Mr. Parkinson, who is a carrier at Cirencester, upon the company, at their station at Cirencester, to deliver to him goods consigned to persons there, upon a general order or authority in the following terms:—"You will be good enough to deliver to Mr. Parkinson at the Cirencester railway station all goods that may arrive consigned to us." This order was signed by the persons who wished to have their goods delivered to them through Parkinson, and was addressed to the manager of the company's goods department. That was a general request. Indeed, it was not likely that the consignees could in all cases say what specific goods

(1) 4 Bing. 476.

were coming. No question arises as to the form in which the thing was to be delivered. We must assume, therefore, that the direction was particular enough. Here is Mr. Grierson's answer as to that:—"With reference to Mr. Parkinson's complaint of the refusal of the company's officers to hand to him at Cirencester for delivery the goods of Messrs. Parry & Son and other traders who have lodged or may lodge general authorities for that purpose, I have to state that it is not the practice of the company to accept or act upon general orders or authorities from consignees for the delivery of goods in Cirencester,"—no suggestion is made as to any difficulty of identification,—"but, on the contrary, they require all carriers and persons acting in a similar capacity to and carrying on their business in the same way as Mr. Parkinson, to furnish written orders from the consignees properly specifying the particular goods which the consignees desire to be delivered up by the company to the person applying for the delivery." The carrier, therefore, is required to send to the consignee for a specific order for each parcel before the company will deliver it to him. In other words, he is to be so delayed that delivery through him would be impracticable. Now, what is the reason given? "The company not only carry on at Cirencester the ordinary business of a railway company, but also that of common carriers, and incidentally thereto undertake the collection and delivery of goods in the town, and have an office there." The obvious meaning of that is, that Mr. Parkinson's carrying on the same business would interfere with theirs. The letter goes on:—"Mr. Budd is employed by the company as their sole agent for the collection and delivery of all goods which the company undertake to collect or deliver in Cirencester, and also for the collection there on their behalf of moneys due to the company for the carriage and collection and delivery of goods. He also keeps for them the above-mentioned office in Cirencester, answers inquiries for them, and attends to their general business, and renders them various other services. Mr. Budd, therefore, is a member of the company's staff, and in fact their servant, and acts under the direction of the company, and is subject to their immediate control, and moreover undertakes and is responsible to them for the due and safe collection and delivery in Cirencester of goods which the company are bound to collect or

1871

PARKINSON v. GREAT WESTERN RAILWAY CO.

deliver there as common carriers. These arrangements with Mr. Budd are essential and necessary for the efficient and proper management of the company's traffic and the proper and speedy collection and delivery of the goods, and conduce greatly to the advantage and convenience of the public."

Now, let us see what are the provisions of the Railway Traffic Act on the subject, and what are the authorities upon it. The Act gives the consignees the right to receive their goods at the station without being obliged to employ any intermediate hands. The matter was distinctly considered by this Court in three cases, and it was decided that the company have no right, against the will of the consignees, to insist upon carting goods to their destination either by themselves or by any other person employed by them, even where no extra charge is made for that purpose. It has been said that Mr. Parkinson does not represent the public, and that, to warrant the Court in interfering, some public inconvenience or grievance must be shewn. I agree that, if a private individual comes forward to complain of a grievance which is peculiar to himself, the Court will regard his application with considerable jealousy. But here is a person who carries on the business of a common carrier, and who is told by the company's manager, "You shall not use our railway unless you employ us as common carriers off the railway." I think we must regard Mr. Parkinson as representing all those persons in Cirencester who choose to employ him and not the company to convey from the railway goods which come there consigned to them.

The 2nd section of 17 & 18 Vict. c. 31, lays down the law thus :— "Every railway company, &c., shall according to their respective powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways belonging to or worked by such companies respectively; and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, nor shall any such company subject any particular person or company to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." It is unnecessary to read any further; that is quite enough to shew that the company are bound to give reasonable facilities to all persons using their railway, and

without undue preference for any one. It is true the company have a right, if they think proper, to receive and deliver goods carried by their railway, and to make charges for such receipt and delivery. But it is also true that they cannot give to themselves any undue or unreasonable preference or advantage, because in doing so they would be withholding from the complainant and other carriers and the public such reasonable facilities for the receiving and forwarding and delivering of traffic as the Act says they shall have. They cannot be allowed to substitute some other mode of getting the goods to or from the station, for that which their customers think fit to adopt. Now, let us see if that is not borne out by the authorities. It will be sufficient for this purpose to refer to the cases which are to be found in the fifth and sixth volumes of the Common Bench Reports, N. S.

In *Baxendale* v. *Great Western Ry. Co., Reading Case* (1), it appeared that down to a recent period the Great Western Railway Company charged a uniform rate of 3*s.* 6*d.* per ton on all goods in a particular class conveyed on their railway between Reading and Paddington. These goods were collected and delivered (principally) by Pickford & Co. at a charge of 4*s.* 10*d.* per ton. The company raised their charge for carrying goods under 500lbs. weight to 8*s.* 4*d.* per ton, being the aggregate of the former charge for carrying and that for collecting and delivering; with an intimation to the public that *they* would collect and deliver goods *free of all charge*. The real purpose of this arrangement was made apparent to the Court to be, to compel persons desiring to have their goods conveyed by their railway to employ the company to collect and deliver such goods, and thus to secure this business and the profit of it to themselves, as well as to exclude the complainants from competing with them in this department of business. The Court held that this was an undue preference by the company of themselves in their separate character of carriers beyond their line, and an unreasonable disadvantage imposed on the complainants. The effect of that decision is that it is not lawful for a railway company to give an advantage to themselves over other carriers in the carriage of goods to and from their stations. An application was afterwards made to the Court to re-hear the question on the ground

(1) 5 C. B. (N.S.) 336; 28 L. J. (C.P.) 81. 4 Jur. N.S. 1167.

1871

PARKINSON v. GREAT WESTERN RAILWAY CO.

that *no profit* was made either by the company or by the carriers upon the charges for collecting and delivering goods for their customers at the respective stations; but the Court refused to do so: *Garton* v. *Great Western Ry. Co.* (1) The result is that such a mode of conducting their business, even though productive of no profit to the company, will, if it throws a difficulty on a competing carrier in the way of his trade, render the company amenable to an injunction.

The last case I would refer to is *Garton* v. *Bristol and Exeter Ry. Co.* (2) The company closed their goods station at Bristol at 5.15 p.m. against all persons except their agent, Wall, who had a receiving-house about a mile distant from the station, and from whom the company received goods up to 8 p.m. Wall made a certain charge for the conveyance of goods from the receiving-house to the station. Upon the complaint of a rival carrier that the refusal to receive goods sent by him to the station after 5.15, unless sent through the receiving-house of Wall, was imposing upon him an undue prejudice, within the statute, the Court made absolute a rule for an injunction, although it was sworn on the part of the company that the goods so brought to the station by Wall came there properly classified, weighed, and prepared for loading. It is obvious, therefore, that the statute makes it the duty of the company to receive goods at and deliver them from the station to the consignee or any one authorized by him to receive them, and not to throw difficulties in his way. The manager's letter and the complainant's affidavits satisfy me that the impediments placed in the way of the complainant were the result of a deliberate design to impose upon him an undue prejudice, and to obtain for the company an undue preference and advantage in their trade of competing carriers.

It was urged that great difficulties might arise to the company if they are obliged to act upon these general orders, inasmuch as they would run the risk of delivering the goods to a stranger. But we cannot make any distinction of persons in a case like the present. The company have no right to prefer themselves or any one carrier to another. Besides, this is only complaining of what

(1) 5 C. B. (N.S.) 669; 28 L. J. (C.P.) 158.

(2) 6 C. B. (N.S.) 639; 28 L. J. (C.P.) 306.

is the ordinary state of things. Upon the whole, I am of opinion that the complainant has brought himself within the words of s. 2 of the Railway Traffic Act, as explained by the decisions, and therefore that he is entitled to have this rule made absolute, with costs.

BYLES and KEATING, JJ., concurred.

Rule absolute.

Attorneys for complainant: *Peacock & Goddard, for Mullings, Ellett, & Co., Cirencester.*

Attorneys for defendants: *Young, Maples, Teesdale, Nelson, & Co.*

GOOD AND OTHERS *v.* THE LONDON STEAM-SHIP OWNERS' MUTUAL PROTECTING ASSOCIATION.

June 23.

Shipping—Mutual Protection Association—Construction of Deed—"Improper Navigation."

An association of steam-ship owners agreed by deed to indemnify each other, in respect of ships entered by them in the association, against (amongst other things) "loss or damage which, by reason of the improper navigation of any such steam-ship as aforesaid, may be caused to any goods, &c., on board such steam-ship."

The plaintiffs' steam-ship *Severn* was duly entered, and whilst on a voyage from Memel to Hull with a cargo of linseed and flax, having encountered heavy weather, and being short of coals, she put back to Frederickshaven to coal, and to trim her cargo, which had shifted. Going into the harbour she took the ground, but was got off within an hour. The pumps were put on to try whether she had made any water, and for this purpose the bilge-cock was opened, but through the negligence of the crew this cock was not closed when the attempt to pump ceased. Whilst the *Severn* was moored at Frederickshaven quay, orders were given to put on the donkey-engine pumps to fill the boilers, and for this purpose the sea-cock was opened. The sea-cock communicated with the box or tank in which was the bilge-cock; and, when the boilers were filled, the sea-cock being through a like negligence left open, the water entered in large quantities by means of the open bilge-cock into the hold of the vessel, and damaged the linseed:—

Held, that this was a damage arising from "improper navigation," within the meaning of the deed.

CASE stated by arbitrators for the opinion of the Court:—

1. Messrs. Good, Flodman, & Co., are owners of the steam-ship *Severn.*

2. The London Steam-ship Owners' Mutual Protecting Association is formed under and for the purposes set forth in a certain deed, a

1871

GOOD v. LONDON STEAM-SHIP OWNERS' ASSOCIATION.

copy of which is annexed to this case, and part of which deed is in the words and figures following, that is to say:—

"Know all men by these presents that we the several persons, co-partnership firms, and companies whose names are hereunto subscribed, have agreed to become members of the association called 'The London Steam-ship Owners' Mutual Protecting Association,' for the purpose of protecting and indemnifying each other, and our respective heirs, executors, and administrators, and successors, in the manner and to the extent hereinafter mentioned, against losses, claims, demands, damages, and expenses arising from or occasioned by all or any of the following events or occurrences, that is to say:—

"(1.) From loss of life or personal injury caused to any person carried in a steam-ship whereof any of us may be the owner or owners, and which may be duly entered in the books of the association.

"(2.) From loss of life or personal injury which, by reason of the improper navigation of any such steam-ship as aforesaid, may be caused to any person carried in any other ship or boat.

"(3.) From loss or damage which by reason of the collision of any such steam-ship as aforesaid with any other ship or boat, may be caused to such ship or boat, or to any goods, merchandise, or other things whatsoever on board such ship or boat, to the extent of one-fourth part of such loss or damage as is not covered by the usual Lloyd's policy, with collision clause attached.

"(4.) From loss or damage which by reason of the improper navigation of any such steam-ship as aforesaid may be caused to any goods, merchandise, or other things whatsoever on board such steam-ship:

"Provided always that the aggregate amount payable by the members of this association in respect of any number of claims arising from any one occurrence, shall not exceed the sum of 10,000*l.* for any one steam-ship.

"Now, these presents witness that, in pursuance of such agreement, and in consideration of the mutual indemnity and protection intended to be hereby effected, and of the covenants herein contained, each of us, the said persons, &c., members of this association, and parties hereto, for himself, &c., and his heirs, &c., and successors, do hereby covenant and agree with and to the other and others of them, and with every two or more of them, his heirs, &c., and successors, and also as a separate covenant with Sir G. E. Hodgkinson, of &c., manager, and with his executors, administrators, and assigns, in manner following, that is to say:—

"That, in case any of the said members parties hereto, his heirs, &c., or successors, shall subsequently to the entry of any ship by him in the books of this association, and while he continues a member of this association, in respect of such ship, sustain, incur, and become liable and be required to pay, in respect of any such ship, any loss, claim, or demand, damages, or expenses, for loss of life or personal injury caused to any person carried in such ship, or caused by the improper navigation of such ship to any person carried in any other ship or boat, or for loss or damage caused by the improper navigation of such ship to any goods, merchandise, or other things whatsoever on board any such ship as aforesaid, or on board any other ship or boat, each and every of us the said members executing these presents, his heirs, &c., and successors, shall and will contribute and pay, but only in respect of the liabilities accrued while he shall be or continue a member of this association, in the manner and to the extent hereinafter mentioned, and when the

committee for the time being may direct, order, or appoint, for any member sustaining, incurring, or becoming liable to pay any such loss, claim, demand, damages, or expenses aforesaid, or otherwise, as the said committee may direct, a rateable proportion of such loss," &c.

And these presents further witness that each and every of us the said members, parties hereto, &c., "shall and will observe and perform the several rules and regulations hereinafter contained, and which for convenience of reference are numbered 1 to 27, that is to say (inter alia):—

"(4.) That, when by reason of improper navigation, any member, being the owner of any steam-ship entered in the books of this association, is liable and required to pay damages to the owner or owners of any goods, merchandise, or other things whatsoever on board such steam-ship, for loss or damage to such goods, merchandise, or other things, the members of this association shall indemnify such owner of such steam-ship, in respect of such damages, such proportion as the amount insured entered in respect of such steam-ship in this association bears to her declared insurable value."

3. The owners of the steam-ship *Severn* duly executed the above deed for the purpose of being protected and indemnified, in respect of the said steam-ship *Severn* against all such losses, claims, demands, damages, and expenses as are specified and described in the deed, and they continued to be and were so protected and indemnified at the time of the loss and damage hereinafter described, and during the course of a voyage hereinafter referred to made by the said ship *Severn* from Memel to Hull in February, 1868.

4. Under a charterparty dated the 20th of January, 1868, in which certain perils are excepted in these words, "The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever, during the said voyage, always excepted," the *Severn* proceeded to Memel, and there loaded on board a cargo chiefly consisting of linseed in bulk, and also of a small quantity of flax.

5. The master signed two bills of lading for the said cargo, which bills of lading contained the same exception.

6. The linseed was loaded in bulk in the fore and after holds, and filled the same up to the deck, except over the fore part of the fore-hold, where a small quantity of flax was stowed between the deck and the linseed.

7. The *Severn* thus loaded sailed from Memel on the 8th of February, 1868, for Hull, and on the 15th of February, after having passed through much heavy weather, she was 100 or 150 miles west of the Skaw, when it was found that the coals were

1871

GOOD v. LONDON STEAM-SHIP OWNERS' ASSOCIATION.

nearly exhausted, and that the cargo had shifted. She therefore put back for Frederickshaven, to coal, and trim the cargo.

8. After trying to coal in Frederickshaven Roads, it was found necessary to put into the port. In passing in under steam, she took the ground, and remained aground from three quarters of an hour to an hour.

9. When she was got off the ground, and while she was steaming in towards the quay, the donkey-engine pumps were put on to the fore-hold to try whether she was making any water. For the purpose of doing that, the fore bilge-cock was necessarily opened. When the pumps sucked, which was very soon, there being little water in her, the fore bilge-cock ought to have been shut. The vessel was still steaming towards the quay when that cock ought to have been shut; but it was not shut, it was left open through the negligence of one or other of the crew, and was not observed to be open till some time next morning, when the occurrence hereinafter mentioned drew attention to it.

10. That same day, viz. the 17th of February, after she was moored at the quay, and whilst they were coaling, orders were given to fill the ship's boilers with water. For that purpose the sea-cock was necessarily opened, and the donkey-engine pumps were set to work. When the boilers were filled the donkey-engine was stopped; but the sea-cock, which should have been shut at the same time, was not shut, but was negligently left open till it was observed and shut next morning.

11. Next morning an alarm was given that there was water in the fore-hold. The pumps were sounded, and shewed 11 ft. 6 in. of water in the well in the fore-hold. The second engineer went below, and found both the sea-cock and the fore bilge-cock open, and shut off the sea-cock. The pumps were then applied to the fore bilge, by means of the fore bilge-cock, and in the course of two hours the pumps sucked, shewing that the fore-hold was freed of water. The fore bilge-cock was then shut off.

12. The *Severn* is an iron vessel, and under the fore-hold is a bilge 15 inches deep at its greatest depth, and divided off from the after-hold by a water-tight bulk-head extending from the deck down to the outer skin of the ship. A $2\frac{1}{2}$-inch pipe, intended to draw off the water, passes from the fore-hold bilge through the

engine-room into and terminates in a box called the donkey-engine box. Several other pipes connected with other parts of the ship, and for various purposes, terminate in the same box. One of these pipes is the sea-pipe, which passes through the side of the ship to the sea at some depth below the surface of the water, and is intended to convey on board sea-water for the various uses of the ship. There is a cock to each of these pipes, on the outside of the donkey-engine box, which enables the crew, by means of a spanner, to open and shut each of them. The donkey-engine pump, when applied, operates upon the contents of the box.

13. When the donkey-engine pump is applied to the box,—if, for instance, the fore-hold bilge-cock be open, it draws off the water from the fore bilge into the box, and thence throws it off into the sea. If the sea-cock alone be open, the box fills with sea-water, and the donkey-engine pump throws the water from the box into the boiler or on deck. If the pump be stopped, and the sea-cock be left open, the box will fill with sea-water, and will continue full, but no other consequence will ensue therefrom provided all the other cocks are at the same time shut. If any of the other cocks be open at the same time; for instance, if the fore bilge-cock be open at the same time as the sea-cock is open, and the pump be not going, the sea-water entering by the sea-cock will pass by the fore bilge-cock into the fore bilge, and thence into the well, the fore-hold, and up within the casings about the well, the mast, and the tanks in the fore-hold, but will be prevented by the water-tight bulkhead from passing into or under the after-hold.

14. On the 17th of February, 1868, these two cocks,—the sea-cock and the fore bilge-cock,—were simultaneously open, the time and circumstances of their being severally opened and left open having been hereinbefore described; and they continued simultaneously open till the next morning, the donkey-engine pump at the same time not going. The consequence of these two cocks being thus open at the same time was, that a large body of water was found in the fore-hold of the ship on the morning of the 18th of February, while the *Severn* lay moored at Frederickshaven quay, and by reason of the water so admitted considerable damage was done to the cargo of linseed in the fore-hold.

1871

GOOD v. LONDON STEAM-SHIP OWNERS' ASSOCIATION.

15. As soon as the water was discovered on board, the pumps were set to work, and they freed the ship of water in about two hours.

16. The *Severn* arrived at Hull, her port of destination, on the 24th of February, 1868.

17. A claim has been made for the loss occasioned by the damage to the linseed described in par. 14, against the owners of the *Severn*, by the consignees of the cargo.

The question for the opinion of the Court was, whether the damage in the 14th paragraph mentioned be, under the circumstances hereinbefore described, a loss or damage from or against which the owners of the *Severn* are legally entitled, under the deed of the association, to be protected or indemnified.

If the Court should be of opinion in the affirmative, then the association were forthwith to pay the claimants 337*l.* 11*s.* 4*d.*, with interest thereon at 5*l.* per cent. calculated from the 3rd of October, 1868, up to the day of payment, and also the costs of the reference and special case. If the Court should be of opinion in the negative, the claimants were to pay the costs of the reference and special case.

F. M. White, for the plaintiffs. Any act of omission or commission on the part of the master or any of the crew in the course of the voyage, which leads to damage or loss to the cargo, is "improper navigation" within the meaning of the 4th article of the deed of this association. "Navigation" applies to the carrying the cargo in the ship, and is not confined to the mere government of the ship whilst she is being propelled through the water: *Fletcher* v. *Inglis* (1); *Laurie* v. *Douglas*. (2)

Quain, Q.C. (*Watkin Williams* with him), for the defendants. The damage in respect of which the plaintiffs seek to be indemnified did not occur in the course of the navigation of the *Severn*. It arose simply from an act of negligence on the part of the crew in opening the sea-cock and improperly leaving it open whilst the ship was moored alongside the quay, the fore bilge-cock being already open.

[WILLES, J. The damage occurred partly in the course of

(1) 2 B. & Ald. 315. (2) 15 M. & W. 746.

getting water *out* of the ship for the purpose of navigating her, and partly in getting water *into* the ship for the purpose of navigating her. Is not that a loss by reason of improper navigation?]

This was not a loss for which the plaintiffs are liable under the terms of the charterparty and bill of lading set out in the case; it was a loss within the ordinary peril which is covered by a Lloyd's policy: *Davidson* v. *Burnand.* (1) Improper navigation means improper management of the ship in the progress of a voyage. Would damage arising from bad stowage be within this deed?

[WILLES, J. Certainly; unless in a port where stevedores are employed.

MONTAGUE SMITH, J. Bad stowage which affects the safe sailing of the ship.]

The damage for which the plaintiffs are entitled to be indemnified under the terms of this deed must be something occurring whilst the ship is in the actual performance of the voyage.

WILLES, J. Improper navigation within the meaning of this deed is something improperly done with the ship or part of the ship in the course of the voyage. Suppose the ship were anchored in a place where she ought not to have been anchored without a light, and a collision took place in consequence, clearly that would be a damage arising from improper navigation,—an omission properly to navigate the ship. Here, the bilge-cock having been opened for the purpose of getting water out of the ship, and having been negligently left open, the sea-cock was opened for the purpose of getting in water to work the ship. The omission to close the bilge-cock was clearly improper navigation within the meaning of this deed. It was improper navigation in the course of the voyage.

KEATING, J., and MONTAGUE SMITH, J., concurred.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Parker, Rooke, & Parkers.*
Attorneys for defendants: *Thomas & Hollams.*

(1) Law Rep. 4 C. P. 117.

1871
June 22.

WOODHOUSE, Appellant; ETHERIDGE, Respondent.

Fishery—Fence-Season for Eels—Thames Conservancy Act, 1864 (27 & 28 *Vict.* c. 113), *ss.* 65, 67—*Construction of Bye-Law.*

The 65th section of the Thames Conservancy Act, 1864 (27 & 28 Vict. c. 113), impowers the conservators to make bye-laws for, amongst other things, "determining the times during which the taking of any particular or specified kinds of fish shall not be practised."

One of the bye-laws made in pursuance of that authority was as follows:—"The following respective periods shall be deemed to be the fence-season in the upper river, that is to say,—(*a*) For salmon, salmon-trout, and trout, the period between the 10th September in each year and the 31st of March following, both inclusive,—(*b*) For pike, jack, perch, roach, rudd, barbel, bream, chubb, carp, tench, grayling, gudgeon, pope, dace, crayfish, bleak, minnow, and every kind of fish known as river fish (except salmon, salmon-trout, and trout), the period between the 14th February in each year and the 31st of May following, both inclusive:"—

Held, that "eels" are included in the general words, "every kind of fish known as river fish."

Case stated by Justices of Berkshire under 20 & 21 Vict. c. 43.

At a petty sessions held at Windsor on the 25th of June, 1870, the appellant was convicted of having unlawfully in the upper river of the Thames taken and attempted to take, and had in his possession, certain kind of fish known as river fish, to wit, eels, within the fence-season for the same, to wit, between the 14th of February and the 31st of May, contrary to the upper Thames bye-laws of 1869, and contrary to the form of the statute, &c.

1. The appellant claimed under a lease from one Caton, dated the 15th of September, 1868, a fishery comprising certain eel-bucks in the upper Thames, for seven years from the 25th of September, 1868, at the yearly rent of 50*l*. No question of title was raised.

2. The eels comprised in such fishery form a valuable part of the produce thereof.

3. The respondent is the superintendent of the upper Thames navigation, duly appointed by the conservators.

4. The 8th of the upper Thames bye-laws of 1869, which purport to be made in exercise of the powers conferred by the Thames Conservancy Act, 1857 (20 & 21 Vict. c. cxlvii.), the Thames Con-

servancy Act, 1864 (27 & 28 Vict. c. 113), ss. 31, 65, the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), ss. 41, 42, and the Thames Conservancy Act, 1867 (30 & 31 Vict. c. ci.), s. 12, is as follows:—

"The following respective periods shall be deemed to be the fence-season in the upper river, that is to say,—

"(*a*) For salmon, salmon-trout, and trout, the period between the 10th day of September in each year and the 31st of March following, both inclusive.

"(*b*) For pike, jack, perch, roach, rudd, barbel, bream, chubb, carp, tench, grayling, gudgeon, pope, dace, crayfish, bleak, minnow, and every kind of fish known as river fish (except salmon, salmon-trout, and trout), the period between the 14th day of February in each year and the 31st day of May following, both inclusive."

5. By the 9th bye-law it is declared that it shall not be lawful for any person, as regards the upper river, inter alia, to fish for, or take, or attempt to take, or to have in his possession, any fish within the fence-season for the same; and that, if any person does anything in contravention of the now stating bye-law, he shall for every such offence be liable to a penalty not exceeding 5*l*.

6. It was admitted by the appellant, for the purpose of raising the question for decision in this case, that he had, within the limits of the said several fishery, and between the 14th of February and the 31st of May in the present year, taken eels by means of traps or engines called grig-weels.

7. Such grig-weels are wicker baskets sunk in the river by means of weights. They contain a chamber into which there is an entrance narrowing inwards nearly to a point, and formed at the end of converging willow-rods. These rods diverge easily upon pressure externally, and so admit the long, thin body of the eel into the chamber, when they close again and prevent his regress. These engines are intended to be used only for the catching of eels; but other fish may be caught therein.

8. Salmon and salmon-trout and trout spawn between the 13th of September and the 31st of March, and during that period, are out of season and unfit for human food; and the taking of them during that period would be a wanton hindrance to their propagation.

1871

WOODHOUSE v. ETHERIDGE.

9. All the different species of fish specifically named in par. (*b*) of the 8th bye-law, except salmon and salmon-trout and trout, spawn during the period between the 14th of February and the 31st of May, and during that period are out of season and unfit for human food; and the taking of them during that period would be a wanton hindrance to their propagation.

10. Statements were made and quotations read from different works upon natural history, by the advocates of the appellant and respondent, as to the nature and habits of the eel; but no sufficient evidence was given to enable the justices to find as a fact how eels are propagated,—whether they are oviparous or viviparous, or whether they do or do not spawn or propagate their young between the 14th of February and the 31st of May, or at any other particular time. It was alleged by the appellant, but disputed by the respondent, that eels are never known to be out of season or unfit for human food at any time when it is possible to take them.

11. Eels can only be taken by the means employed by the appellant, or otherwise by use of baits, during the period between the beginning of March and the end of October. They are taken in the months of October, November, and December, by means of large fixed engines called eel-bucks, which intercept them in their passage down the river towards the sea.

12. It was contended for the appellant that it had not been proved that eels are "fish known as river fish," but that it had been proved that they were not ejusdem generis with the several kinds of fish specified by name in sub-s. (*b*) of the 8th bye-law, so as to be included in the description "every kind of fish known as river fish" in the bye-law mentioned; that they were not within the mischief intended to be provided against by the bye-law; and that therefore, according to the true and reasonable intent and construction of the bye-law, the appellant had not committed any offence.

13. The magistrates, being of opinion that the 8th bye-law included eels in the expression "every other fish known as river fish," considered that they must convict.

The question for the opinion of the Court was whether, upon the facts above stated, the magistrates were bound to convict the

appellant of an offence against the 8th bye-law, if read together with the exception in the 13th of the bye-laws. (1)

Harington, for the appellant. By s. 65 of 27 & 28 Vict. c. 113, the conservators are impowered to make bye-laws for, amongst other things, "determining the times during which the taking of any *particular* or *specified* kinds of fish shall not be practised;" and s. 67 expressly saves the rights of the owners or occupiers of private fisheries, except as to any bye-law made for, amongst other things, "determining the times during which the taking of any *particular* or *specified* kinds of fish shall not be practised." The question is whether the conservators have by the 8th bye-law set out in par. 4 of the case included eels within the description of fish to which the fence-season is to apply. This bye-law enumerates by name a vast number of fish, beginning with pike and ending with minnows, and then adds, "and every other kind of fish known as river fish, except salmon, salmon-trout, and trout." Eels being a valuable fish, it is hardly conceivable that the framers of these bye-laws could have intended to leave them to be dealt with under the general words. It may well be doubted whether eels come at all within the description of "river fish." No evidence appears to have been given before the magistrates that eels require the protection of a fence-season; though it is well known that they, like salmon, have their season for going down to the sea. And, if there be any ambiguity in this bye-law, the Court will not so construe it as to interfere with a private right.

Bosanquet, contrà. Eels clearly come within the definition of

(1) "Nothing in these bye-laws, except the provisions relative to the fence-season, shall take away or abridge any right of the owner or occupier of a private fishery, or any person having a private right of fishing, or having authority in writing in this behalf from any such owner, occupier, or person to fish for, or to take, or attempt to take fish by means of nets commonly called cast nets and crayfish nets, or by grig or ground-weels for eels, or by night-lines, or by means of eel-bucks or stages, so far as the same can be legally used, or, with a special licence from the conservators in writing under their common seal, but not otherwise, by means of a net commonly called a hoop-net, having a mesh of not less than two inches from knot to knot when wet, or eight inches all round, and not being more than six yards long; or, with the like special licence as aforesaid, but not otherwise, by means of a net commonly called a drag-net, having a mesh of not less than two inches from knot to knot when wet, or eight inches all round."

1871

WOODHOUSE v. ETHERIDGE.

"river fish" in this bye-law. The words are wide enough to embrace them; and the magistrates have found as a fact that they are river fish.

Harington, in reply. The 11th bye-law contains provisions prohibiting the taking of unsizable fish. It enumerates several kinds of fish,—and indeed all of any importance that are usually found in fresh water,—but eels are not mentioned. That affords a strong argument that they were not intended to be dealt with at all.

WILLES, J. This is a question raised, apparently by arrangement, for the purpose of determining whether clause (*b*) of the 8th bye-law made by the conservators of the Thames under the authority of the 27 & 28 Vict. c. 113, s. 65, does or does not apply to eels. The bye-law runs thus:—"The following respective periods shall be deemed to be the fence-season in the upper river, that is to say,—(*a*) For salmon, salmon-trout, and trout, the period between the 10th of September in each year and the 31st of March following, both inclusive." That disposes of salmon, salmon-trout, and trout. Then comes clause (*b*),—"For pike, jack, perch, roach, rudd, barbel, bream, chubb, carp, tench, grayling, gudgeon, pope, dace, crayfish, bleak, minnow, and every kind of fish known as river fish (except salmon, salmon trout, and trout), the period between the 14th of February in each year and the 31st of May following, both inclusive." Taking that bye-law by itself, there can be no doubt that an eel which is bred and living in a river is a "river fish." Lord Coke, in Co. Litt. 5. b., referring to Domesday, speaks of eels as belonging to the class of river fish; and I think it is clear from the 13th bye-law that the conservators did intend to give to eels the protection provided by the 8th bye-law. Mr. Harington says he finds no evidence in the case, either in terms or by inference, as to eels requiring any fence-season; and that they might well have been intentionally omitted from the bye-law, by reason of their spawning in the sea,—if they spawn at all. I must confess I do not follow that reasoning. But it is enough to say that the law regards the order of nature; that all fish must at some time bring forth their young; and consequently that there is a season at which they are unfit for human food, and require special protection. That being so, there may be a particular period of the year when

eels require to be protected. The general notion is that eels roll down to the sea with the autumn floods. I do not pronounce any opinion as to the expediency of this bye-law: seasons may differ in different rivers. There is enough to warrant the conclusion that the conservators had a right to fix the period during which eels require protection, and might well fix the time at which they are supposed to be coming up the river with their young. I see nothing irrational, therefore, in coming to the conclusion that the bye-law in question was intended to apply to eels. The burthen of shewing that it was absurd or wrong lies upon the party who seeks to impeach it. Looking at the absence of classification of the different species of fish which are mentioned, I do not think any argument can be derived from the rule of construction which refers general words to persons or things ejusdem generis with those last enumerated. Then it is said that, assuming the language of the bye-law, taken by itself, to be sufficient to include eels, they are not so specified as to make the bye-law such as the conservators had power under s. 65 of 27 & 28 Vict. c. 113 to make: in other words, that eels, if intended to be included in it, should have been specifically named in the bye-law. But, taking ss. 65 and 67 together, I do not think the legislature intended to impose upon the conservators the necessity of specifying or describing every particular kind of fish nominatim. If the conservators did intend to include eels in this bye-law, they are included in it; if they did not, they are at liberty to set the matter right by altering the language. I think the decision appealed against should be affirmed.

MONTAGUE SMITH, J. I also think that the safer rule to act upon is, to hold that the framers of these bye-laws intended to include eels in the words "every kind of fish known as river fish." A contrary construction would, as it seems to me, do violence to the words. It is unnecessary for me to say more, my Brother Willes having exhausted the subject.

Decision affirmed.

Attorney for appellant: *C. T. Phillips.*

Attorneys for respondent: *Vizard, Crowder, & Co.*

1871
June 23.

LEE and Another *v.* THE BUDE AND TORRINGTON JUNCTION RAILWAY COMPANY.

Ex parte Stevens. *Ex parte* Fisher.

Company—Sci. fa. under 8 & 9 *Vict. c.* 16, *s.* 36—*Judgment Creditor—Discretion of the Court—Act of Parliament obtained by Fraud.*

The discretion of the Court in granting or refusing a sci. fa. against a shareholder under s. 36 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), is to be a judicial discretion exercised according to the known rules of law. A vague suggestion of fraud, or that parliament was imposed upon by false recitals in the special Act, will not, where a fair primâ facie case is made out by the plaintiff, induce the Court to withhold the writ; but the party will be left to plead to the sci. fa. any defence, legal or equitable, which he may have.

The defendants were incorporated by the Bude and Torrington Railway Act, 1869, by the name of the Bude and Torrington Junction Railway Company. The plaintiffs, who had acted as solicitors for the company, on the 18th of April, 1871, obtained a judgment against them for 5375*l.* and 20*l.* costs. On the 29th of April, writs of fi. fa. against the company were delivered to the sheriffs of Devonshire and Cornwall respectively, which writs were on the 4th and 8th of May respectively returned nulla bona. The projected line of railway was limited to the counties named. The company possessed no lands upon which the judgment could be satisfied by elegit, nor had they entered on or purchased any land or commenced making their railway. The names of John C. Moore Stevens and Thomas Fisher were on the register of shareholders of the company as holders of 25 and 125 shares respectively, in respect of each of which shares the sum of 16*l.* remained unpaid.

Rules nisi for the issuing of writs of scire facias against these two shareholders, under s. 36 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), were obtained, against which

June 23. *Sir John Karslake, Q.C.*, and *Raymond*, for Stevens, and *Horace Lloyd, Q.C.*, and *A. L. Smith*, for Fisher, shewed cause.

Stevens' affidavit in opposition to the rule against him was in substance as follows:—

1. In the year 1865, the Okehampton Railway Company was authorized by an Act called "The Okehampton Railway (Extensions to Bude and Torrington) Act,

1865 (28 & 29 Vict. c. cxlix), to make and maintain certain works in that Act particularly described, for extending their railway to Bude, in the county of Cornwall, and to Great Torrington, in the county of Devon.

2. The powers given by that Act (which received the royal assent on the 29th of June, 1865,) for the compulsory purchase of land were to be exercised within three years from the passing of the Act; and the extension railways authorized by it were to be completed within five years from its passing.

4. By that Act the name of the company was altered from "The Okehampton Railway Company" to "The Devon and Cornwall Railway Company."

5. In October, 1865, being the owner of land through which the extension railway would pass, I was applied to by the directors to take shares in the Devon and Cornwall Railway Company, and consented to do so, and accordingly received a letter informing me that twenty-five shares created under "The Okehampton Railway (Extension to Bude and Torrington) Act, 1865," had been allotted to me; and I paid the deposit of 4*l.* per share thereon.

8. The Devon and Cornwall Railway Company have never done any work whatever upon the extension lines authorized by the said Act; nor have they entered into any contract whatever for the purchase of any land for the purposes thereof; nor have they ever issued any share or shares whatever in respect of the undertaking authorized by that Act, and in respect of which my application was made.

13. The plaintiffs were, as I am informed and believe, the solicitors of the Devon and Cornwall Railway Company, and acted for them in obtaining the before-mentioned Bude and Torrington Extensions Act.

14. In 1867, the Devon and Cornwall Railway Company obtained an Act of Parliament called "The Devon and Cornwall Railway Act, 1867 (30 & 31 Vict. c. cxxv), by which Act the Bude and Torrington extensions authorized by the Act of 1865 were divided into four sections, each section being made a separate and distinct undertaking, with separate and distinct capitals.

15. I took no part whatever in the application for or obtaining the said Act; nor did I in any way authorize the application to parliament for it; nor was I in any way consulted before it was applied for. I have never applied for any share or shares in any of the separate undertakings into which the original undertaking was by that Act divided; nor has any share or shares in any of those separate undertakings been allotted to me.

16. The said Act recites that the company had not raised any money under the Act of 1865, which is wholly inconsistent with any of the shares under the Act of 1865 having been allotted or there being any shareholders under that Act.

17. The plaintiffs were the solicitors of the Devon and Corwwall Railway Company when the Act of 1867 was applied for and obtained; and they must have known either that there were no shares allotted and no shareholders under the Act of 1865, or that the recital in the Act of 1867, upon which that Act was in part founded, was false.

18. To the best of my knowledge, information, and belief, nothing whatever has been done towards making the extensions authorized by the before-mentioned Acts.

19. In the year 1869, an Act of Parliament was applied for and obtained, called "The Bude and Torrington Junction Railway Act, 1869" (32 & 33 Vict. c. cxxvii), whereby it is, amongst other things, enacted,—s. 4, that "all persons

1871

LEE v. BUDE AND TORRINGTON JUNCTION RAILWAY CO.

and corporations who have already subscribed or shall hereafter subscribe to the undertaking, and their executors, &c., shall be united into a company for the purpose of making and maintaining the railway to be called The Bude and Torrington Junction Railway, and for other the purposes of this Act; and for those purposes shall be incorporated by the name of The Bude and Torrington Junction Railway Company," and shall be a body corporate, &c. Sect. 5 is as follows:—"Subject to the provisions of this Act, on and from the passing of this Act all the lands acquired and all the works executed by the Devon and Cornwall Railway Company by virtue of the Act of 1865 and the Act of 1867, and all the powers, rights, and privileges conferred on the Devon and Cornwall Company by the said Acts and the Acts or parts of Acts incorporated therewith, whether for the construction and maintenance of the Bude and Torrington extensions, or for the purchase of lands for the purposes thereof, or for levying tolls and charges in respect thereof, or for any other purpose with relation thereto, together with the benefit, rights, privileges, obligations, claims, and demands of and under all contracts, agreements, and arrangements, shall be vested in the company, and shall be exercised by the company as fully and effectually as though the same powers, rights, and privileges had been originally conferred upon the company; and in like manner all the duties, obligations, and liabilities imposed upon or attaching to or incurred by the Devon and Cornwall Company with respect to the Bude and Torrington extensions shall be performed by and attach to the company; and the Act of 1865 and the Act of 1867, respectively, shall be read as though the name of the company had been used therein instead of the name of the Devon and Cornwall Company: Provided that the company and the shareholders thereof shall be exempt from the debts, duties, and liabilities with relation to the general undertaking of the Devon and Cornwall Company, and, subject to the provision next hereinafter contained, the Devon and Cornwall Company and the shareholders thereof shall be exempt from all debts, duties, and liabilities relating to the Bude and Torrington extensions, and shall be indemnified therefrom by the company, and all the powers of the Devon and Cornwall Company with respect to the Bude and Torrington extensions shall absolutely cease: Provided also that nothing contained in this Act shall take away or shall prejudicially affect the rights, claims, powers, or remedies possessed or enjoyed at the time of the passing of this Act by any person whatsoever, whether upon the Devon and Cornwall Company and their undertaking or upon the Bude and Torrington extensions."

20. Except as in this affidavit appears, I had not subscribed to the undertaking mentioned in the Act of 1869; and I was not when that Act passed a person who had subscribed to the undertaking mentioned in it.

21. I in no way authorized or assented to the application for the Act of 1869; nor have I in any way consented to either of the before-mentioned Acts of 1867 and 1869, or the applications for them.

23. I am informed and believe that at the time of the passing of the Act of 1869, no land had been acquired nor any contract made for the purchase of any land for the said extensions.

24. Although the said extension works had not been commenced, and the time limited for their completion by the Act of 1865 would expire in June, 1870, no provision is contained in the Act of 1869 for extending the time for completing the works, nor is the time limited by the Act of 1865 for the compulsory purchase of land extended by the Act of 1869, although, as I am informed and believe, no

land whatever had been bought or contracted for for the purpose of the said extensions when the Act of 1869 was applied for and obtained.

25. I have been informed and believe that the only persons now having any interest whatever in the existence of the company are, certain creditors consisting principally of the engineer, the present plaintiffs, and certain surveyors and local solicitors; and I am informed and believe that the plaintiffs' claim against the company, and upon which the judgment now sought to be enforced against me was obtained, was principally, if not entirely, for and in respect of their costs and charges in applying for and obtaining the Acts of 1867 and 1869: and, although the plaintiffs themselves caused it to be recited in the Act of 1867 that the company had not raised any money under the Act of 1865, they are now seeking to make me liable only in respect of my having consented to take shares under that Act.

26. The proceedings taken by the plaintiffs in obtaining the before-mentioned Acts, in heaping up costs against the company, and in suing and obtaining judgment against them, were not proceedings taken in good faith, but mere schemes and devices to promote their own individual purposes only: and it would be unjust and inequitable, under the circumstances, to allow them to issue execution against me."

Fisher's affidavit, mutatis mutandis, was to the same effect.

It is discretionary with the Court to grant or to withhold the sci. fa. under 8 & 9 Vict. c. 16, s. 36,—*Scott* v. *Uxbridge and Rickmansworth Ry. Co.* (1), *Shrimpton* v. *Sidmouth Ry. Co.* (2),—and the circumstances of this case clearly justify the Court in withholding the writ. Nothing having been done pursuant to the Act of 1865 in furtherance of the undertaking thereby contemplated, to which undertaking alone Messrs. Stevens and Fisher agreed to become subscribers, and the time for exercising the powers of that Act having been suffered to expire, they are no longer liable as shareholders. The Acts of 1867 and 1869, of which the plaintiffs were the promoters, were obtained by means of fraudulent recitals and representations; and these are matters which, though they afford a good answer in equity, cannot be pleaded to the sci. fa.

H. James, Q.C., and *Bridge*, in support of the rule, were not called upon.

WILLES, J. This is an application for a writ of sci. fa. to try the question whether two persons, as shareholders in the Bude and Torrington Junction Railway Company, are bound to pay to the plaintiffs so much as may remain unpaid upon their respective

(1) Law Rep. 1 C. P. 596. (2) Law Rep. 3 C. P. 80.

1871

LEE
v.
BUDE AND TORRINGTON JUNCTION RAILWAY CO.

shares, in discharge of a debt in respect of which the plaintiffs have obtained a judgment against the company, pursuant to 8 & 9 Vict. c. 16, s. 36.

The mode of proceeding under that section is, to obtain a judgment against the company, and to use every available means to enforce that judgment against the property of the company; and then, failing to obtain satisfaction, to apply to the Court for leave to issue a scire facias to have execution against the property of the shareholders. It is obvious, therefore, that the proceedings under that section are meant as a supplement to the proceedings against the company, to enforce against the shareholders the payment of that which they are liable to pay towards the capital of the company. In reality they are no more than executions against a particular kind of property of the company.

I will assume that this judgment was obtained in respect of a claim by the plaintiffs as solicitors for the company for the costs and expenses incurred in applying for, obtaining, and passing the Acts of 1867 and 1869. I will assume that they were the persons who took those proceedings. There must have been meetings of the directors, and announcements in the newspapers of the day giving notice of the intended application for the Acts and of the several proceedings before parliament in reference to them, so as to give every one interested in opposing their passing an opportunity of being heard. Assume the plaintiffs were the guiding spirits, what is the judgment of parliament as to the costs incurred? The 30th section of the Act of 1867 and the 19th of the Act of 1869 expressly provide that "all costs, charges, and expenses of and incident to the preparing and applying for and the obtaining and passing of the Act shall be paid by the company." It is only necessary to refer to *Carden* v. *General Cemetery Co.* (1) to shew that those words have a distinct meaning, giving a remedy by action against the company, including the execution against unpaid calls on shares under s. 36 of the Companies Clauses Consolidation Act, 1845, viz. by sci. fa. against the shareholders. I entirely agree that the Court is not bound under that section absolutely to issue a sci. fa. against the alleged shareholders. It was intended that the Court should exercise a discretion, that is, a judicial discretion regulated

(1) 5 Bing. N. C. 253.

according to known rules of law. That is the meaning of the expression as usually found in the books. The sci. fa. is not a writ of right, to be obtained as of course; but it is of right, when the Court is satisfied that there is proper and just ground for allowing it to issue. And I apprehend that, where there is a primâ facie legal claim which is sought to be enforced without vexation or oppression, and the plaintiff is not in the same position as the person against whom he seeks to have execution, the Court is bound, in the exercise of a judicial discretion,—even though there may be circumstances in the case which incline them to look with disfavour upon the application,—to grant the rule, in order that the matter may be fully discussed. In so doing the Court in no degree prejudges the matter, but leaves it open to any substantial answer either at law or in equity. That is entirely consistent with all the cases which have been referred to. What this Court did in *Shrimpton* v. *Sidmouth Ry. Co.* (1) is quite intelligible. The applicant had himself been the holder of a large number of shares upon which nothing had been paid, and which it was suggested he had fraudulently assigned to a third person in trust for himself; and the Court declined to exercise its discretion in his favour until he had satisfied them that the suggestion was groundless. *Scott* v. *Uxbridge and Rickmansworth Ry. Co.* (2) was also a clear case: the applicant might have had all that he was entitled to without coming to the Court. As to the power of setting up fraud, either at law or in equity, as an answer to the proceeding, it is enough to refer to *Philipson* v. *Earl of Egremont.* (3) That case is observed upon in the elaborate judgment of Lord Romilly, M.R., in *Green* v. *Nixon.* (4) In the event of any vexatious attempt to enforce this remedy in a fraudulent manner, *Horn* v. *Kilkenny and Great Southern and Western Ry. Co.* (5) shews that the Court of Chancery has jurisdiction to grant relief, though that Court would probably require some more definite allegations of fraud than are contained in these affidavits.

It is then said that the plaintiffs have been guilty of fraudulent devices with a view to their own advantage. That involves a very

(1) Law Rep. 3 C. P. 80.
(2) Law Rep. 1 C. P. 596.
(3) 6 Q. B. 587.
(4) 23 Beav. 530; 27 L. J. (Ch.) 819.
(5) 1 K. & J. 399; 24 L. J. (Ch.) 241.

1871

LEE v. BUDE AND TORRINGTON JUNCTION RAILWAY CO.

serious imputation, which we could not dispose of upon a conflict of affidavits.

It is further urged that the company was a mere nonentity, and there never were any shares or shareholders. That resolves itself into this, that parliament was induced by fraudulent recitals (introduced, it is said, by the plaintiffs,) to pass the Act which formed the company. I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from parliament. It was once said,—I think in Hobart (1),—that, if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them. The Act of Parliament makes these persons shareholders, or it does not. If it does, there is an end of the question. If it does not, that is a matter which may be raised by plea to the sci. fa. Having neglected to take the proper steps at the proper time to prevent the Act from passing into a law, it is too late now to raise any objections to it.

As far as regards the suggestions impugning the conduct of the plaintiffs themselves, I have assumed that there is foundation for them; but I have done so merely for argument sake. If they can be sustained, recourse may be had to the proper proceedings for calling them in question: but we cannot discuss them upon this motion. I think the rule must be made absolute.

BYLES, J. I am of the same opinion. The parties against whom these rules are moved are primâ facie shareholders in the company.

(1) In *Day* v. *Savadge* (Hob. 87): "Even an Act of Parliament made against natural equity, as, to make a man judge in his own case, is void in itself; for, jura naturæ sunt immutabilia, and they are leges legum."

The plaintiffs have obtained a judgment against the company. Writs of fi. fa. have been issued against the company and returned nulla bona; and the plaintiffs have satisfied us that they have no means of obtaining the fruits of their judgment out of any goods or property of the company. Under these circumstances the plaintiffs are entitled to have recourse against any persons who are shareholders, upon the terms mentioned in 8 & 9 Vict. c. 16, s. 36. The statute says that execution may issue against them; but the practice of the Courts requires it to be done by means of a writ of scire facias, against which the parties are at liberty to shew any defence they may have, whether legal or equitable. If the defence is neither, of course it will fail, and execution will issue.

KEATING, J. I am of the same opinion. The cause shewn against this rule is entirely novel. Two Acts of Parliament have said that all the costs, charges, and expenses of and incident to the preparing and applying for and the obtaining and passing of the Act shall be paid by the company. The persons to whom the costs are due have obtained a judgment against the company for the amount, and have issued execution against them, but have failed to obtain satisfaction. They now seek to avail themselves of the mode of enforcing their claim against certain shareholders of the company as pointed out by the Companies Clauses Consolidation Act, 1845. The only substantial answer offered to the sci. fa. issuing is, that parliament has been imposed upon. I agree with the whole of my Brother Willes's judgment; but I base my opinion especially upon the impossibility of giving effect to that argument.

Rule absolute.

Attorneys for plaintiffs: *Bircham & Co.*
Attorney for Stevens: *P. Karslake.*
Attorney for Fisher: *S. Spofforth.*

1871

June 23.

BRINSMEAD *v.* HARRISON.

Tort-Feasors; Effect of Judgment in an Action against one—Detinue—Trover—Recovery, without Satisfaction—Judgment.

A judgment in an action against one of two joint tort-feasors is a bar to an action against the other for the same cause, although such judgment be unsatisfied: so held upon the authority of *King* v. *Hoare* (13 M. & W. 494).

A judgment against the defendant in trover without satisfaction does not vest the property in the goods in the defendant,—overruling the dictum of Jervis, C.J., in *Buckland* v. *Johnson* (15 C. B. 145; 23 L. J. (C.P.) 204).

DETINUE for a piano-forte.

Fourth plea, that the detention in the declaration mentioned was committed by the defendant under the direction of and jointly with one A. M. Thompson, and not otherwise; that the plaintiff theretofore, in this Court, sued the said A. M. Thompson for the conversion and detention of the goods in the declaration mentioned, and recovered against her 41*l.* 10*s.* damages and his costs of suit; that the said judgment still remained in force; and that there never was any detention of the said goods other than what was done jointly with the said A. M. Thompson, for which damages were recovered as aforesaid.

Replication, that the alleged judgment against the said A. M. Thompson was at the commencement of this suit, and still remained, wholly unsatisfied; and that the plaintiff had always been and still was wholly unable to obtain satisfaction of the same. The plaintiff also new-assigned that he sued, not only for the detention of the said piano-forte therein admitted, but also for the detention thereof upon other and subsequent occasions, to wit, after the alleged recovery and until the commencement of this suit and until now.

Demurrers to the replications, on the ground that, whether the judgment was satisfied or not, was immaterial; and that the justification pleaded shewed that the property was changed. Joinder.

June 22. *Powell, Q.C.* (*Joyce* with him), in support of the demurrers. The recovery against Mrs. Thompson in the former action is a bar to an action for the same cause against another joint tort-feasor. A judgment in trover vests the property in the

goods in the defendant from the time of the conversion; *Buckland* v. *Johnson* (1), and the cases referred to in the judgment of Jervis, C.J.

[WILLES, J. That was a dictum which was not necessary for the decision of the case; and it has since been impugned. He also referred to the note to *Holmes* v. *Wilson*. (2)]

The judgment of Parke, B., in *King* v. *Hoare* (3) is quite conclusive. And see *Brown* v. *Wootton*. (4)

Kelly, contrà. The judgment recovered against Mrs. Thompson did not change the property or bar the present action, it not having been followed by *satisfaction*: Bro. Abr. *Judgment*, pl. 98; Rol. Abr. *Execution* (F); Shep. Touch. 227; Jenk. 4th Cent. Case 88; *Morton's Case* (5); *Whiteacres* v. *Hamkinson* (6); *Hitcham* v. *Murcham* (7); *Foster* v. *Jackson* (8); *Cocke* v. *Jennor* (9); *Honey* v. *Rice* (10); *Corbet* v. *Barnes* (11); *Claxton* v. *Swift* (12); *Bird* v. *Randall* (13); *Drake* v. *Mitchell* (14); *Morris* v. *Robinson* (15); *Watters* v. *Smith* (16); *Collins* v. *Evans* (17); *Cooper* v. *Shepherd* (18); *Marston* v. *Phillips* (19); *Baker* v. *Sayers* (20); *Priestly* v. *Fernie* (21); *Keyworth* v. *Hill* (22); *Bermondsey* (*Vestry*) v. *Ramsey*. (23) The following American authorities were also referred to:—2 Kent Com. 387 (10th ed. 506); Story on Bailments, § 276; Sedgwick on Damages, 4th ed. 579; *Livingston* v. *Bishop* (24); *Lovejoy* v. *Murray*. (25)

[WILLES, J., referred to Com. Dig. *Action* (K. 4), and to the observations of Byles, J., in *Edmondson* v. *Nuttall*. (26)]

Powell, in reply, cited *Ex parte Higgins*. (27)

(1) 15 C. B. 145; 23 L. J. (C.P.) 204.
(2) 10 Ad. & E. 511.
(3) 13 M. & W. 494.
(4) Cro. Jac. 73; Yelv. 67; Moore, 762.
(5) Cro. Eliz. 30.
(6) Cro. Car. 75.
(7) Noy. 4.
(8) Hob. 59.
(9) Hob. 66.
(10) 2 Roll. Rep. 224.
(11) Sir W. Jones, 377.
(12) 2 Show. at p. 498.
(13) 3 Burr. at p. 1353; W. Bl. at pp. 374, 387.
(14) 3 East, 251.
(15) 3 B. & C. 196.
(16) 2 B. & Ad. at p. 892, per Tenterden, C.J.
(17) 5 Q. B. at p. 823, per Tindal, C.J.
(18) 3 C. B. 266.
(19) 9 L. T. (N.S.) 289.
(20) 17 L. T. 579.
(21) 3 H. & C. 977; 34 L. J. (Ex.) 172.
(22) 3 B. & Ald. 685, 688.
(23) Ante, p. 247.
(24) 1 Johns, 290.
(25) 3 Wallace, 1.
(26) 17 C. B. (N.S.) at p. 297.
(27) 3 D. & J. 33; 27 L.J. (Bkcy.) 27.

1871

BRINSMEAD v. HARRISON.

WILLES, J. It is impossible to decide that this plea is other than a good answer, without overruling *King* v. *Hoare* (1) and *Brown* v. *Wootton* (2), because Lord Wensleydale, upon the authority of the last-mentioned case, treated it as quite clear that, "if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause." So far as tort is concerned, that is precisely to the same effect as the law laid down by Chief Baron Comyns in Com. Dig. *Action* (K. 4). If that doctrine is to be disturbed, and we are to adopt the decisions of the American courts, we can only be called upon to do so when taught by a Court of error that Lord Wensleydale was wrong. We entertain the highest respect for the American jurists, and are always ready to receive instruction from their decisions upon questions of general law. But the question whether a plaintiff is to be allowed to maintain a second action against one whom he ought to have sued jointly with another in a former action, is purely one of procedure, and on such a question we are bound by the authorities in our own courts.

The new-assignment, however, raises an entirely different point. It states that the plaintiff sues not only for the detention of the piano-forte admitted by the plea, but also for its detention after the recovery in the former action and until the commencement of this suit. It must be assumed, therefore, that the plaintiff is suing, not merely for the original wrong, but that having recovered a judgment against one of two wrong-doers which has not been satisfied, he is suing in an action against the other for keeping the goods, and so continuing the wrong. He is asserting a property in the goods as against the other tort-feasor, or any third person. Some third person,—whether an original tort-feasor or not,—has seized and keeps the plaintiff's goods, and the defendant seeks to set up as an answer the judgment recovered, but not satisfied, against some one else for the detention of the same goods. It is impossible to say that the judgment ought to be an answer to an action against a joint tort-feasor, unless it would be an answer to an action against a third person. That must turn upon the question whether a judgment in an action for conversion vests the property in the defendant, the wrong-doer, even though he has

(1) 13 M. & W. 494. (2) Yelv. 67; Cro. Jac. 73; Moore, 762.

not paid the damages. Upon that point, I think we ought to take time to consider, from the respect due to the opinion expressed by Jervis, C.J., in *Buckland* v. *Johnson.* (1) On the other hand, there is considerable authority for saying, what one's reason would naturally lead one to say, that the property remains unchanged until actual satisfaction of the judgment.

MONTAGUE SMITH, J. I also think that the question raised by the plea is disposed of by the passage referred to from Com. Dig. *Action* (K. 4.) and the judgment of Parke, B., in *King* v. *Hoare.* (2) In the case of contract, the judgment recovered against one of several joint-contractors is a bar to an action against the others. In that case, there is clearly but one cause of action; and it has passed into rem judicatam. There is an end of the matter. The case of joint tort-feasors would seem from the early authorities cited to be different. I must confess I should have thought that a judgment against one was not a bar to an action against another, because joint tort-feasors may be sued separately. I feel myself, however, bound by the authority of Chief Baron Comyns and Lord Wensleydale, and the current of authorities which have followed them, to hold that the plea in this case is good. As to the other point, I agree with my Brother Willes that it deserves consideration.

Cur. adv. vult.

June 23. The judgment of the Court (Willes and Montague Smith, JJ.,) was delivered by

WILLES, J. We decided yesterday that, according to the law laid down by Lord Wensleydale in *King* v. *Hoare* (2), a judgment in an action against one of two joint tort-feasors is a bar to an action against the other for the same cause. There remains, however, an entirely different question, which arises upon the new-assignment, and which is, whether a judgment in trover, without satisfaction, changes the property in the goods so as to vest the property therein in the defendant from the time of the judgment, or of the conversion, or whether such recovery operates as a mere assessment of the value, on payment of which the property in the

(1) 15 C. B. 145; 23 L. J. (C.P.) 204.

(2) 13 M. & W. 494.

1871

BRINSMEAD v. HARRISON.

goods vests in the defendant. It is obvious that this is a different question from that which we have already disposed of; because, if the mere recovery vests the property in the defendant, the property is equally changed as to all strangers. It is a question which affects the transfer of property generally.

We are of opinion that no such change is produced by the mere recovery. The proceeding in such an action is not a proceeding in rem: it is, to recover primâ facie the value of the goods. It may be that the goods have been returned, and the judgment given for nominal damages only. To say in such a case that the mere obtaining judgment vests the property in the defendant would be an absurdity. It is clear, therefore, that the judgment has no specific effect upon the goods. The only way the judgment in trover can have the effect of vesting the property in the defendant is, by treating the judgment as being (that which in truth it ordinarily is) an assessment of the value of the goods, and treating the satisfaction of the damages as payment of the price as upon a sale of the goods, according to the maxim in Jenk. 4th Cent. Case 88. Any other construction would seem to be absurd.

This question whether the property is changed by the mere recovery in trover appears to have led to much difference of opinion. The authority mainly relied upon by Mr. Powell was the dictum of Jervis, C.J., in *Buckland* v. *Johnson* (1), in which that very learned and accurate judge did lay it down, upon the authority of a case in Strange (2), that the property is changed by the mere recovery, without any satisfaction. I would observe, however, that the case, as reported in Strange, is far from satisfactory. It is also reported in Andrews, p. 18, where the case is thus stated:—"An action of trover was brought by the present plaintiff against one Mason, wherein he obtained judgment by default, and afterwards had final judgment; whereupon a writ of error was brought. And another action was now brought against Broughton by the same plaintiff, and for the same goods for which the first action was brought." An application appears to have been made to hold the defendant in the second action to special bail; and there was sufficient reason why special bail should not

(1) 15 C. B. 145, 157; 23 L. J. (C.P.) 204.
(2) *Adams* v. *Broughton*, 2 Str. 1078.

be allowed, because the judgment against Mason had the effect of preventing a second action being maintained against Broughton. The loose expressions of the Court,—that "the property of the goods is entirely altered by the judgment obtained against Mason, and the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had; and this against all the world,"—were quite unnecessary. The same may be said as to the dictum of Jervis, C.J., in *Buckland* v. *Johnson.* (1) That was an action against a person who jointly with his son had sold goods the proceeds of which the defendant had received. After the sale, the plaintiff (who claimed the goods), in ignorance that the father had received the money, brought an action against the son for money had and received and for damages for the conversion, and recovered a verdict for 100*l.* against him; but, not succeeding in obtaining satisfaction, in consequence of the son's insolvency, he brought a second action against the father for the same causes. It is clear that the proceedings in the first action amounted to an election to treat the matter as a wrong, and precluded the plaintiff from bringing a fresh action for money had and received. It was equally clear that the judgment in the first action was a merger of the remedy against either the father or the son; and, when the action was brought against the father, the answer was obvious. It was wholly unnecessary, therefore, to decide, as suggested by Jervis, C.J., that the recovery in the first action changed the property; and what was said was properly treated by the reporter as amounting only to a "semble."

On the other hand, there is a series of decisions shewing that a mere recovery, without satisfaction, has not the effect of changing the property. In Jenkins, 4th Cent. Case 88, it is said: "A., in trespass against B. for taking an horse, recovers damages; by this recovery, *and execution done thereon,* the property of the horse is vested in B. Solutio pretii emptionis loco habetur." That doctrine is acted upon in *Cooper* v. *Shepherd* (2); and, though the marginal note treats the *recovery* as changing the property,—a doctrine thrown out also in the note to *Barnett* v. *Brandao* (3),—

(1) 15 C. B. 145; 23 L. J. (C.P.) 204. (2) 3 C. B. 266.
775 (3) 6 M. & G. at p. 640.

1871

BRINSMEAD v. HARRISON.

the plea shews that the damages were satisfied; and the judgment of Tindal, C.J., shews that the property vests in the defendant only "on payment of the damages." To the same effect are the observations of Holroyd, J., in *Morris* v. *Robinson*. (1) "Where in trover," he says, "the full value of the article has been recovered, it has been held that the property is changed by judgment and satisfaction of the damages. Unless the full amount is recovered, it would not bar even other actions in trover." To the same effect is the note in 2 Wms. Saund. 47 *c c*, n. (z). It may also be proper to refer to the note to the case of *Holmes* v. *Wilson* (2), in which the law is stated by the reporters probably at the suggestion of one of the judges. The good sense of the thing and abundant authority thus appearing, we feel bound to give judgment for the plaintiff upon the new-assignment.

In order, however, to act upon our judgment of yesterday and to-day, it must be recollected that the present defendant will not be liable except in respect of a wrong other than that which was the subject of the action against the other wrong-doer.

Another point arises upon the new-assignment. The plaintiff may have acquired the property in the goods after the recovery of the judgment in the former action. As, however, that point was not argued, we prefer resting our judgment upon the main point.

The judgment therefore will be for the defendant upon the sixth plea, and for the plaintiff upon the new-assignment.

Judgment accordingly.

Attorney for plaintiff: *Isaac Berridge.*
Attorneys for defendant: *Blachford & Riches.*

(1) 3 B. & C. 196, at p. 206. (2) 10 Ad. & E. at p. 511.

IN THE MATTER OF JOHN LEWIS RICHARDS AND THE HOME ASSURANCE ASSOCIATION, LIMITED. 1871 *June* 2.

Joint-Stock Company—Shareholder—Allotment of Shares.

R. agreed with the directors of an assurance association to become their local manager for a particular district. As a condition of his being appointed to that office, it was required that he should take twenty-five shares in the association. R. accordingly applied for that number of shares, and they were allotted to him, and his name was placed upon the register of shareholders, he having paid the deposit of 1*l.* per share. He was thereupon appointed manager, and notice of the appointment was given to and accepted by him :—

Held, that these facts disclosed a sufficient allotment, and notice thereof to R.; and the Court refused to remove his name from the register of shareholders.

IN Hilary Term, 1870, a rule was obtained on behalf of Mr. Richards calling upon the Home Assurance Association to shew cause why the register of shareholders of the company should not be rectified by his (Richards's) name being removed therefrom as a holder of twenty-five shares in the company; and by a subsequent rule, of Easter Term following, it was ordered that a special case or report should be stated by a barrister for the opinion of the Court. The report was as follows:—

1. Negotiations took place between Richards and Kilpatrick, the duly authorized agent of the association for that purpose, with reference to the former being appointed district-manager of the association for Manchester.

2. As a condition of Richards being appointed to that office, it was required that he should take twenty-five shares in the association; and Richards accordingly agreed to apply for and take such shares.

3. There was no arrangement or understanding that the application of Richards for such shares should be considered as merely formal, or that the shares should not be allotted to him, but to anybody he might name.

4. The circumstance that the persons named in the prospectus of the association were trustees thereof, and were likely to continue such, was not referred to by Richards before or at the time he agreed to take the shares, or before or at the time he applied for the same as hereinafter mentioned; nor was that circumstance an inducement for, or made a condition of, his entering into the agreement and applying for the shares.

5. On the 2nd of July, 1869, Richards applied for twenty-five shares in the association, by filling up and signing the usual printed form of application; and at the same time he paid 12*l.* 10*s.* in cash, and by arrangement with Kilpatrick gave his acceptance at three months for 12*l.* 10*s.*, as a deposit of 1*l.* per share, on the application for the said twenty-five shares.

6. On the 7th of July, 1869, in accordance with the application, twenty-five

1871

RICHARDS v. HOME ASSURANCE ASSOCIATION.

shares in the association were allotted to Richards, and his name was then entered in the register as the holder thereof.

7. On the same day Richards was duly appointed district-manager of the association for Manchester. Notice of the appointment was given him by letter of the 12th of July, 1869; and he accepted the same.

8. Beyond negotiating for some offices for the purpose of carrying on the business, nothing was done or attempted to be done by Richards as such district-manager, in the way of procuring business for the association or otherwise, although he was not prevented by the association from doing so if he had so chosen. Richards has derived no pecuniary advantage from his appointment.

9. Some few days after his appointment, Richards obtained information that the trustees and one of the auditors of the association, whose names appeared on the prospectus, would probably resign; and after some correspondence between himself and the secretary of the association upon the subject, he, on the 11th of August, 1869, wrote to the secretary requesting that the shares he had applied for should not be allotted, and that the deposit of 12*l.* 10*s.* in cash, with his acceptance for the same amount, should be returned to him until the trustees were appointed and a prospect of doing business was established; alleging as his reasons, that his application for shares was a mere matter of form, and that he had applied for the appointment and the shares on the faith of the prospectus being a bonâ fide document, and having confidence in the trustees, whereas he now found that the trustees had resigned.

10. Up to this time (August 11th, 1869), Richards had received no formal notice of the shares having been allotted to him, nor had any application been made to him for the 1*l.* per share payable on allotment. The secretary of the association, however, in replying to the letter of the 11th of August, informed Richards that the shares had been allotted at the time the appointment was given.

11. After some further correspondence between himself and the secretary, Richards, on the 30th of August, 1869, finally resigned his appointment and again demanded a return of the 12*l.* 10*s.* he had paid and his acceptance. His resignation was accepted, but the return of the 12*l.* 10*s.* and acceptance was refused.

12. The prospectus issued by the association was a bonâ fide document; and the directors had permission to publish the names of the then trustees that appeared thereon; but, after the twenty-five shares were allotted to Richards, and he had received his appointment, certain differences arose between the directors and the trustees, which resulted in the resignation of the latter and the appointment of new trustees.

13. The above-mentioned twenty-five shares are the shares in respect of which Richards seeks to have his name removed from the register of shareholders.

Morgan Howard shewed cause. The appointment of Richards as district-manager was conditional upon his being the holder of twenty-five shares in the association. He accepted the appointment and applied for the shares; and he was aware that twenty-five shares had been allotted to him. *Formal* notice of allotment is not necessary; it is enough that he was informed, no matter how, that

his application was acceded to: *New Theatre Company* (*Bloxam's Case*) (1); *Universal Banking Corporation* (*Gunn's Case*) (2); *International Company* (*Levita's Case*) (3); *Universal Banking Company* (*Harrison's Case*). (4)

Tindal Atkinson, in support of the rule. Lord Justice Page Wood, in *Harrison's Case* (5), says: "The course of the decisions has determined that to obtain a binding allotment, there must be an application, an allotment, and a communication of the allotment." Notice is essential to constitute the applicant a shareholder. There must be an allotment of specific shares, and such an assent thereto as to bind both parties: *Richmond Hill Hotel Company* (*Pellatt's Case*). (6) Lord Cairns, C., there says that "there is no binding contract to take shares until the company have communicated to the applicant an allotment of shares."

[BYLES, J. Mr. Richards knew he could not be district manager unless he had the shares. He applied for shares, and paid the deposit; and he accepted the appointment.]

Until he repudiated the shares, he was never called upon to pay the 1*l.* which was payable on allotment. He might have thought the company did not mean to hold him to the condition. In *Anglo-Danish and Baltic Steam Navigation Company* (*Shalgreen and Carroll's Case*) (7), it was held that an agreement to become agents for the company was not enough to charge the parties as contributories, in the absence of a communication to the agents of the fact of allotment. In *National Savings Bank Association* (*Hebb's Case* (8), Hebb applied in writing for ten shares in a company, and the directors allotted him ten shares: after the allotment, but before it was communicated to Hebb, he withdrew his application: and it was held that he had not agreed to accept the shares. In *Levita's Case* (3) there was actual knowledge of the allotment: Levita had acted as a director of the company. And in *Harrison's Case* (4) there was no formal repudiation. Here, however, the shares were distinctly repudiated; and nothing was done by Richards as manager.

(1) 33 Beav. 529; 33 L. J. (Ch.) 519, 574.
(2) Law Rep. 3 Ch. 40.
(3) Law Rep. 3 Ch. 36.
(4) Law Rep. 3 Ch. at p. 633.
(5) Law Rep. 3 Ch. 637.
(6) Law Rep. 2 Ch. 527.
(7) Law Rep. 3 Ch. 323.
(8) Law Rep. 4 Eq. 9.

1871

RICHARDS v. HOME ASSURANCE ASSOCIATION.

BYLES, J. I am of opinion that the rule to remove the name of Mr. Richards from the register of shareholders of the association should be discharged. The grounds upon which the application is based are, that the shares were applied for as mere matter of form, and that Mr. Richards received no formal notice of allotment. In the first place, he took the appointment of district-manager upon the condition that he should be the holder of twenty-five shares; and the notice he received of his appointment recites the number of shares he had allotted to him, and they were specifically allotted to him at the time. In the next place, he paid for the shares partly in money and partly by a bill. His name then stood in the books of the association as the owner of the shares. That, as it seems to me, amounts to an allotment of shares and notice thereof to him. Independently, therefore, of authority, I am of opinion that Mr. Richards is responsible as owner of the shares in question. But, if any authority were wanting, it is to be found in *Levita's Case* (1) and *Gunn's Case.* (2) Those cases shew that formal notice is not necessary.

KEATING, J. I am of the same opinion. It is agreed on the one side that Mr. Richards was not a shareholder in this association unless he had notice or knowledge that the shares he applied for had been allotted to him; and it is conceded on the other hand that a formal notice was not necessary. But it was said, and truly said, that there must be some act done by the directors conveying to the mind of the applicant the impression that the shares had been allotted to him, so that they could not recede. The sole question therefore is, whether or not that which took place here was tantamount to an allotment. It seems that there was an agreement between the directors and Richards that the latter should be their local manager for Manchester; and the second paragraph of the report states that, "as a condition of Richards being appointed to that office, it was required that he should take twenty-five shares in the association; and Richards accordingly agreed to apply for and take such shares." He did apply for twenty-five shares, and that number was allotted to him, and his name was placed upon the register of shareholders, he having paid the deposit of 1*l.* per

(1) Law Rep. 3 Ch. 36. (2) Law Rep. 3 Ch. 40.

share. Upon his so becoming a shareholder, and not before, he was appointed district-manager, and notice of the appointment was given to and accepted by him. I agree with Mr. Atkinson that Richards could not be considered as a shareholder until there was something done by the directors which was tantamount to an allotment, and the fact was communicated to him. But I think the circumstances clearly amounted to an allotment and notice. There is, therefore, no ground for this motion.

MONTAGUE SMITH, J. I also am of opinion that the report shews that the applicant, Mr. Richards, is a shareholder in this association. In ordinary cases, three steps are necessary to make a complete allotment, so as to bind the company on the one side and the allottee on the other: the allottee should apply for shares, and the company should allot them to him, and a notification should be sent to him that they have done so. In the present case, there is no dispute as to the first two steps. Richards did apply for twenty-five shares, and the directors did allot them to him. It is said, however, that no notification of the allotment was given so as to bind the parties. It is true there was no formal notice of allotment given: but I think enough was done to notify to the applicant that the allotment had been made. It was made in consequence of its being a condition to the appointment of manager which he sought that he should be the holder of twenty-five shares in the association. If the directors had not appointed him manager, they could not have bound him by any allotment they might make: *Harrison's Case.* (1) The allotment was contingent on his appointment. Having allotted the shares to Richards, the directors on the same day communicated to him the fact that he was appointed district-manager. And he accepted the appointment. That was, according to all the authorities, a sufficient notification to him that the shares had been allotted to him. It is clear that there need be no *formal* notice given. Anything emanating from the company which indicates to the party that the shares have been allotted to him, and which binds them, will be sufficient. *Levita's Case* (2) and *Gunn's Case* (3) clearly support

(1) Law Rep. 3 Ch. 633. (2) Law Rep. 3 Ch. 36.
(3) Law Rep. 3 Ch. 40.

1871

RICHARDS v. HOME ASSURANCE ASSOCIATION.

this view. There are, no doubt, some strong expressions by Lord Cairns in *Pellatt's Case* (1) which are apparently of a contrary tendency: but those dicta must be read with reference to the circumstances of the particular case. That which was held to make the applicant in *Levita's Case* (2) a shareholder was, that he had attended meetings as a director, the ownership of shares being a necessary qualification to his being a director. So here, the possession of twenty-five shares was necessary to qualify Richards to be a district-manager. Lord Justice Rolt, in *Gunn's Case* (3), says: "In deciding *Levita's Case* (2) yesterday, I did not take Lord Cairns in *Pellatt's Case* (1) to have meant that there must be a response in writing; but that what he meant was this,—there must be, in writing, or verbally, or by conduct, something to shew the applicant that there was a response by the company to his offer." It seems to me in this case that there was such a notification of the allotment on the part of the association, and such an assent thereto on the part of the applicant, as to bind both.

Rule discharged.

Attorneys for applicant: *Marsden & Chubb.*
Attorney for defendants: *John Rae.*

June 5.

RUSSELL AND OTHERS *v.* THE TITHE COMMISSIONERS FOR ENGLAND AND WALES.

Tithe Commutation Acts (6 & 7 *Wm.* 4, *c.* 71, *ss.* 40, 42, *and* 23 & 24 *Vict. c.* 93, *s.* 42)—*Assignment of District.—Extraordinary Charge in respect of Hop-grounds and Market-gardens.*

Under the Tithe Commutation Act (6 & 7 Wm. 4, c. 71), ss. 41, 42, the tithe commissioners have power to create or assign a new district and to impose an extraordinary rent-charge upon lands newly cultivated as hop-grounds or market-gardens in a parish in which no district had been assigned at the time of the original commutation.

PROHIBITION. Declaration, that the plaintiffs are occupiers of lands in the parish of Plumstead, Kent, and that, after the passing of the 6 & 7 Wm. 4, c. 71, that is to say, in the year 1842, proceedings

(1) Law Rep. 2 Ch. 527. (2) Law Rep. 3 Ch. 36.
(3) Law Rep. 3 Ch. 45.

were had under the said Act and other Acts then in force with reference to the commutation of the tithes arising in the said parish, and the assistant-commissioner duly appointed under the Acts duly made his award, as follows:— . . . "Whereas, I find the estimated quantity in statute measure of all the lands of the parish which are subject to payment of tithes amounts to 2904 acres and 20 perches, which are used or cultivated as follows, that is to say, 1123 acres 3 roods as arable lands, 1450 acres 3 roods as meadow or pasture, 163 acres 2 roods as woodland, and 161 acres 20 perches as orchards and gardens: . . . And whereas, I find that all the lands in the parish are, save as hereinbefore mentioned, subject to the payment of all manner of tithes in kind: And whereas, I have estimated the clear annual value of the tithes of the parish in the manner directed by the Act of Parliament, and have also taken into account the rates and assessments paid in respect of such tithes during the seven years of average prescribed by the Act: And whereas, I find that the president and fellows of Queen's College in Oxford are impropriators of all the tithes of corn and pulse arising from the under-mentioned lands, that is to say, All that and those the farm and lands belonging to them the said president and fellows, and now in the occupation of Mr. James Russell, called the Manor Farm, and containing by estimation 144 acres, statute measure: And whereas, I find that Richard Clement, of Plumstead aforesaid, is impropriator of all the tithes of corn and pulse arising from (certain other lands described): And whereas, I find that the Rev. Charles Burrell Cookes, of the city of Bath, clerk, is owner of the impropriate rectory of the said parish, and as such entitled to all the tithes of corn and pulse arising from all other the lands of the said parish, and that the vicar of the said parish is entitled to all the tithes other than the tithes of corn and pulse arising from all the lands of the said parish: And whereas due notice was given to me in the manner prescribed by the Act that the clear average value of the vicarial tithes of the parish during the seven years preceding Christmas, 1835, would not fairly represent the sum which ought to be the basis of a permanent commutation of the said tithes: And whereas I have taken into consideration all the allegations and proofs tendered to me touching the matter of the

1871

RUSSELL v. TITHE COMMISSIONERS.

said notice before awarding the vicarial rent-charge hereinafter mentioned: Now know ye that I the said [assistant-commissioner] do hereby award that the annual sum of 40*l.* by way of rent-charge, subject to the provisions of the said Act, shall from the 1st day of October next following the confirmation of the apportionment of the said rent-charge be paid to the president and fellows and their successors, instead of all the tithes of corn and pulse arising from all the farm and lands called Manor Farm; and that the annual sum of 208*l.* 11*s.* also by way of rent-charge, and subject to the provisions and to commence from the time aforesaid, shall be paid to Richard Clement, his heirs and assigns, or to the persons entitled in remainder or reversion after him, instead of all the tithes of corn and pulse arising from all the lands of the parish so tithable to him as aforesaid; and that the annual sum of 138*l.* also by way of rent-charge, and subject to the provisions and to commence from the time aforesaid, shall be paid to Charles Burrell Cookes, his heirs and assigns, or to the persons entitled in remainder or reversion after him, instead of all the tithes of corn and pulse arising from all the said lands of the parish so tithable to him as aforesaid; and that the annual sum of 700*l.* also by way of rent-charge, and subject to the provisions and to commence from the time aforesaid, shall be paid to the vicar of the parish for the time being, instead of all the tithes other than the tithes of corn and pulse arising from all the lands of the parish except the glebe; and that the further annual sum of 1*l.* also by way of rent-charge, and subject to the provisions and to commence from the time aforesaid, shall be paid to the vicar instead of all the vicarial tithes arising from the glebe-lands of the parish, whenever the same are not in the occupation or manurance of the vicar himself. In testimony whereof I have hereunto set my hand this 13th day of August, 1842."

Averment, that the amounts by the award appointed to be paid in lieu of tithes payable within the parish were duly apportioned, and certain parts thereof were duly apportioned and charged upon the lands held and occupied by the plaintiffs as hereinbefore mentioned; that the award and apportionment were duly confirmed; that, at the time of the said commutation proceedings and the making of the award and apportionment, no notice was given by

the owners of the lands in the said parish which were then cultivated as orchards or gardens that the tithes hereof should be separately valued, nor was the said parish or any part thereof assigned by the tithe-commissioners or the assistant-commissioner as a district, nor was it at the time of the commutation proceedings within any district assigned for the purpose of estimating or separately valuing the tithes of lands cultivated as orchards or gardens, nor was the amount charged by the apportionment upon any of the lands in the parish distinguished into two parts, to be called the ordinary and extraordinary rent-charges; that, long after the completion of the commutation proceedings and the confirmation of the award and apportionment, that is to say, on the 24th of November, 1868, the defendants were requested by the vicar of the parish to award and fix an extraordinary charge per imperial acre in respect of lands newly cultivated as market-gardens after the commutation, and to declare the parish of Plumstead a district within which the extraordinary charge should be paid, subject to the provisions of the Acts for the commutation of tithes; and that, upon such request, the defendants appointed C. Wood, Esq., an assistant-commissioner in that behalf, who held meetings, and ultimately made his award as follows, that is to say, ... "Whereas, under the provisions of the Acts for the commutation of tithes in England and Wales, the tithes of the parish of Plumstead, in the county of Kent, have been duly commuted for the several annual sums to be paid by way of rent-charge in lieu thereof: And whereas the said parish is not, nor are any of the lands thereof, included within the limits of any district for which an extraordinary rent-charge on market-gardens has been distinguished: And whereas, since the commutation of the tithes of the parish, divers lands therein have been newly cultivated as market-gardens: And whereas, the tithe-commissioners for England and Wales have been requested in the manner provided by the Acts to charge an additional rent-charge by way of extraordinary charge upon the market-gardens newly cultivated as such in the parish since the commutation of the tithes of the parish: And whereas the said tithe-commissioners, in pursuance of the provisions of the said Acts, appointed me, C. Wood, as such assistant-commissioner as aforesaid, to inquire into the matter of the said appli-

1871

RUSSELL v. TITHE COMMISSIONERS.

cation, and, if necessary, to ascertain, award, and fix the additional rent-charge which should be charged by way of extraordinary charge upon market-gardens situate in the parish, newly cultivated as such since the commutation of the tithes of the said parish, and also, if necessary, to declare the parish a district within which the extraordinary charge so to be fixed should be thereafter payable: And whereas, in pursuance of such appointment, I have held divers meetings in the parish for the purposes aforesaid, of which all parties interested had notice, and I have heard all the evidence tendered to me concerning the premises, and have fully considered the same: Now know ye that I, C. Wood, as such assistant-commissioner as aforesaid, and in pursuance of the provisions of the Acts, do make this my award of and concerning the premises, that is to say, I award that the annual sum of 6*s.* per imperial acre, and a proportionate sum for any less quantity than an acre, of all the lands in the parish now or hereafter cultivated as market-gardens, and being newly cultivated as such since the commutation of the tithes of the parish, be paid by way of extraordinary rent-charge at the times that the ordinary rent-charge of the parish is due and payable, and subject to the provisions of the Acts, instead of the tithes of the lands so cultivated as market-gardens in the parish, so long as they shall be so cultivated: And I declare all the lands in the parish of Plumstead a district within which the extraordinary rent-charge of 6*s.* per imperial acre shall be payable for the tithes of market-gardens as aforesaid." The declaration concluded with an averment that the defendants would, unless prohibited, proceed to confirm, and had threatened to confirm, the award; wherefore the plaintiffs prayed that a prohibition might issue from this court to prohibit the defendants from confirming the said award, or from taking any further steps for fixing the said extraordinary charge, or from declaring the said parish a district within which the said extraordinary rent-charge should be payable.

Plea, that, at the time of the said commutation, and thenceforth until the proceedings sought to be prohibited, all the lands in the parish were and still remained beyond the limits of any district in which any extraordinary rent-charge for market-gardens had then been distinguished; and that, after such commutation, divers lands in the parish were newly cultivated as market-gardens

1871

RUSSELL v. TITHE COMMISSIONERS.

within the parish, wherefore the vicar of the parish, being a person interested within the meaning of the said Acts, requested the commissioners as in the declaration mentioned; and that the proceedings which and award the confirmation of which the plaintiffs asked the Court to prohibit by their writ of prohibition, were proceedings regularly taken to comply with the said request and to fix an extraordinary charge upon market-gardens, and to declare the lands in the parish a district within which the extraordinary charge should be payable, as they lawfully might by virtue of the said Acts, and especially the Act of 6 & 7 Wm. 4, c. 71, s. 42, and by the Act of 23 & 24 Vict. c. 93, s. 42; wherefore the defendants prayed that a prohibition might not issue.

Demurrer and joinder.

Edlin, Q.C. (*Petheram* with him), in support of the demurrer, contended that, as no part of the parish of Plumstead had been assigned as a district at the time of the commutation, within which an extraordinary charge should be payable in respect of hop-grounds and market-gardens, and as no extraordinary charge had been distinguished or charged on any market-gardens in the parish at the time of the commutation, the commissioners had no jurisdiction, under 6 & 7 Wm. 4, c. 71, ss. 40, 42 (1), subsequently

(1) Sect. 40 enacts, that, "in case any of the lands in the parish shall be hop-grounds, orchards, or gardens, and notice shall be given by the owner thereof to the commissioners or assistant commissioner acting in that behalf that the tithes thereof should be separately valued, the commissioners or assistant-commissioner shall estimate the value of the tithes thereof according to the average rate of composition for the tithes of hops, fruit, and garden produce respectively during seven years preceding Christmas, 1835, within a district to be assigned in each case by the commissioners or assistant-commissioner, and estimating the same as chargeable to all parliamentary, parochial, county, and other rates, charges, and assessments to which the said tithes are liable, and shall add the value so estimated to the value of the other tithes of the parish ascertained as aforesaid."

Sect. 42 enacts, that, "the amount which shall be charged by any such apportionment as hereinafter provided upon any hop-grounds or market-gardens in any district so to be assigned shall be distinguished into two parts, which shall be called the ordinary charge, and the extraordinary charge; and the extraordinary charge shall be a rate per imperial acre, and so in proportion for less quantities of ground, according to the discretion of the valuers, or commissioners, or assistant-commissioner, by whom the apportionment shall be made as aforesaid; and all lands whereof the tithes shall have been commuted under this Act, and which

1871

RUSSELL v. TITHE COMMISSIONERS.

to charge on any lands in the parish newly cultivated as such an extraordinary charge, or to declare the lands in the parish a district within which such a charge should be payable. They referred to 2 & 3 Vict. c. 62, ss. 26—33, and 23 & 24 Vict. c. 93, s. 42, and to the case of *Walsh* v. *Trimmer*. (1)

Manisty, Q.C. (*F. M. White* with him), contrà, contended that the commissioners had power, under the statutes referred to, to assign a district and impose an extraordinary charge in respect of lands newly cultivated as hop-grounds or market-gardens, at any time, whether there had been a district originally assigned in the parish or not.

WILLES, J. The question for the opinion of the Court is, whether the tithe commissioners, dealing with a parish in which a commutation had taken place, but no part of which had at the time of commutation been assigned as a district within which an extraordinary charge had been distinguished or charged on market-gardens, can, upon the request of the vicar, make an extraordinary

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shall cease to be cultivated as hop-grounds or market-gardens at any time after such commutation, shall be charged, after the 31st of December next following such change of cultivation, only with the ordinary charge upon such lands; and all lands in any such district the tithes whereof shall have been commuted under this Act, and which shall be newly cultivated as hop-grounds or market-gardens at any time after such commutation, shall be charged with an additional amount of rent-charge per imperial acre, equal to the extraordinary charge per acre upon hop-grounds or market-gardens respectively in that district: Provided always that no such additional amount shall be charged or payable during the first year, and half only of such additional amount during the second year of such new cultivation; and an additional rent-charge by way of extraordinary charge upon hop-grounds and market-gardens, newly cultivated as such, beyond the limits of every district in which any extraordinary charge for hop-grounds or market-gardens respectively shall have been distinguished as aforesaid at the time of the commutation, shall be charged by the commissioners at the time of such new cultivation, upon the request of any person interested therein, if such new cultivation shall have taken place during the continuance of the commission of the said commissioners, and, after the expiration of the commission, shall be charged in such manner and by such authority as parliament shall direct, and shall be payable and recoverable in like manner, and subject to the same incidents in all respects, as an extraordinary charge charged upon any hop-grounds or market-gardens at the time of commutation."

(1) Law Rep. 2 H. L. 208.

charge for tithe in respect of new cultivation as market-gardens; or whether their power to impose such extraordinary charge is not subject to the condition precedent that there should have been a district assigned in the parish within which such particular land happens not to be,—that is, whether the last clause of s. 42 of 6 & 7 Wm. 4, c. 71, dealing with the case of an additional rent-charge by way of extraordinary charge upon hop-grounds and market-gardens newly cultivated as such, is not limited to parts of parishes in which a district was appointed at the time of the original commutation, and which do not fall within that district. The commissioners have proceeded, upon the request of the incumbent, to assess an additional rent-charge in respect of market-gardens newly cultivated in the parish of Plumstead since the commutation, there having been no district assigned in the parish under the earlier part of that section at the time of the commutation. We are dealing here with a special and peculiar case with respect to which the Tithe Commutation Act has made particular provisions. Sect. 40 deals with the mode in which the tithe of hops, fruit, and garden produce is to be valued; and s. 41 deals with coppices: but hop-grounds and market-gardens are specially provided for by s. 42. No doubt, that provision was made by reason of the right of the parson to have his tenth of the larger profit resulting from such superior cultivation. Under ordinary circumstances, the commutation under that section was to be final and conclusive; but, as to newly cultivated hops and market-garden produce, there is no reason why the parson should not have the increased payment in respect of the land so cultivated. Nothing is more certain than that the award is not to be final in the event of its turning out that the cultivation as hop-grounds or market-gardens has been abandoned in lands falling within a district assigned at the time of the commutation; because it is provided by s. 42 that "the amount which shall be charged by any such apportionment as hereinafter provided upon any hop-grounds or market-gardens in any district so to be assigned,"—that is, where notice has been given by the land-owner, under s. 40, that he requires a separate valuation,—"shall be distinguished into two parts, which shall be called the ordinary charge, and the extraordinary charge;" "and all lands whereof the tithes shall have been commuted under this Act,

1871

RUSSELL v. TITHE COMMISSIONERS.

and which shall cease to be cultivated as hop-grounds or market-gardens at any time after such commutation, shall be charged, after the 31st of December next following such change of cultivation, only with the ordinary charge upon such lands." The extraordinary charge, therefore, is to cease, and the lands are to be subject to the ordinary charge only, on the cessation of cultivation as hop-grounds or market-gardens. It is not easy to see the connection between s. 40 and s. 42, except that, in respect of lands which had the special productive cultivation at the time of the making of the award, the owners might choose to provide for the possible event of their discontinuing that mode of cultivation, and might desire to have an opportunity of being restored to the ordinary charge. The 42nd section goes on to provide that "all lands in any such district the tithes whereof shall have been commuted under this Act, and which shall be newly cultivated as hop-grounds or market-gardens at any time after such commutation, shall be charged with an additional amount of rent-charge per imperial acre, equal to the extraordinary charge per acre upon hop-grounds or market-gardens respectively in that district." Accordingly, it was finally decided in the House of Lords in the case of *Walsh* v. *Trimmer* (1), that, if there happened to be a district assigned not including the whole parish, and there were common or waste lands within such district not yielding tithes at the time of the commutation, yet such lands, being within a district in respect of which an extraordinary charge was payable in respect of hop-grounds, became liable to pay the extraordinary charge upon being afterwards brought into cultivation as hop-grounds. The originally including such lands within the district must have been accidental. That because by accident the lands were included in the district they should be liable to the extraordinary charge, but that if accidentally left out of the district they should be subject to no charge at all, does seem to me to be a most irrational conclusion. Accordingly, in the argument of *Walsh* v. *Trimmer* (1), it was admitted, and must have been admitted, that, if the land in that case had happened to be accidentally left out of the district which had been assigned, the commissioners would have had power under the subsequent part of the section, and with the assistance of 23 & 24

(1) Law Rep. 2 H. L. 208.

Vict. c. 93, s. 42, to create a new district which would include such lands: but it was said, that, if no district had been assigned on the original commutation, the waste lands, though brought into highly productive cultivation, were to be excluded altogether from the increased charge. That does seem to me to be an equal absurdity to that of holding that the liability to pay the extraordinary charge should depend upon the accident of the land so newly cultivated being included within or left out of the district which had been assigned. Putting a rational construction upon s. 42, I should say that the latter part of that section was meant to extend not only to the case of lands accidentally or mistakenly omitted from a district assigned at the time of the commutation, but to all lands. It may well be, and no doubt is, that, with regard to all ordinary produce, the commutation is final and conclusive, subject to provisions which it is unnecessary to refer to; but it is in respect of these exceptionally lucrative modes of cultivation that these special provisions have been made by the legislature; and there seems no reason for excluding the land in question from those provisions.

The 42nd section goes on to provide that the additional charge shall not be payable during the first year, and half only of such additional amount during the second year of such new cultivation; and then comes the provision with which we are more immediately dealing,—"And an additional rent-charge by way of extraordinary charge upon hop-grounds and market-gardens newly cultivated as such" (I leave out for the present the words "beyond the limits of every district in which any extraordinary charge for hop-grounds or market-gardens respectively shall have been distinguished as aforesaid at the time of the commutation"), "shall be charged by the commissioners at the time of such new cultivation, upon the request of any person interested therein." It is obvious that this could not have been intended to refer to the charge made in respect of the district at the time of the original commutation. The section goes on, "if such new cultivation shall have taken place during the continuance of the commission of the said commissioners, and, after the expiration of the commission, shall be charged in such manner and by such authority as parliament shall direct." It was supposed that the powers of the com-

1871

RUSSELL v. TITHE COMMISSIONERS.

missioners might have come to an end before the time of the new cultivation, and therefore it was provided that the extraordinary charge should be imposed whenever such new cultivation should take place. The section goes on to provide that the extraordinary charge "shall be payable and recoverable in like manner and subject to the same incidents in all respects as an extraordinary charge charged upon any hop-grounds or market-gardens at the time of commutation." This reading appears to me to shew that the charge is to be a new charge in respect of new cultivation: it is not the same as the extraordinary charge imposed at the time of the commutation; but it is to be payable and recoverable in like manner, and subject to the same incidents in all respects, as the extraordinary charge made upon hop-grounds or market-gardens at the time of the original commutation.

I now come back to the words "beyond the limits of every district in which any extraordinary charge for hop-grounds or market-gardens respectively shall have been distinguished as aforesaid at the time of the commutation," What is the meaning of those words? I conceive that they do nothing more than indicate the possibility of some connection between an original district and the additional charge which the commissioners are called upon to make. But, when you find that there is no such connection, you must read those words, "beyond the limits of every district," as meaning, "*not within any district* in which any extraordinary charge for hop-grounds or market-gardens shall have been made at the time of the commutation." Upon the construction of this 42nd section, therefore, with every respect for the very able argument of Mr. Edlin, I come to the conclusion which the reason of the thing would point out, viz. that, in respect of this new cultivation, the commissioners have power to proceed. It seems to fill up the measure of what is reasonable.

As to the 2 & 3 Vict. c. 62, ss. 26—33, to which we have been referred, they seem to extend some of the provisions of the former Act to fruit; and, without going into the construction and meaning of those sections, the language of which is different from that with which we are dealing, it is enough to say that they make special provisions as to fruit; and when you are dealing with specialities, you must look to the genus, which includes the

species. The species here is market-gardens. In the original Tithe Commutation Act an unquestionable distinction is made between the case of market-gardens and other gardens producing fruit. That distinction need not be referred to at large. The 18th section of 3 & 4 Vict. c. 15, is a special provision for giving effect to a parochial agreement. I read it with s. 33 of 2 & 3 Vict. c. 62, and do not find it at all conflicts with the view I take of 6 & 7 Wm. 4, c. 71, s. 42.

The 42nd section of 23 & 24 Vict. c. 93, appears to me to contain some important words, shewing the view I take to be the correct one. It enacts that, "whenever the commissioners are requested by any person interested therein, to charge an additional rent-charge by way of extraordinary charge upon any hop-grounds or market-gardens newly cultivated as such beyond the limits of any district for which an extraordinary charge for hop-grounds or market-gardens respectively shall have been already distinguished, the commissioners may declare the lands in the parish in which such newly-cultivated hop-grounds or market-gardens are situate, a district within which the extraordinary charge to be then fixed by them shall be thereafter payable." The word "every," in s. 42 of 6 & 7 Wm. 4, c. 71, is there changed into "any;" it means "not within the limits of *a* district," &c. I should have thought that reflected a light upon s. 42 of the last-mentioned Act, which justifies the conclusion I have come to upon its words alone. I find nothing in the language of the statute to induce me to think that the commissioners are wrong in proceeding to impose an extraordinary charge in respect of the new cultivation of the lands in question. I therefore think our judgment should be for the defendants.

MONTAGUE SMITH, J. I am of the same opinion. The question is, whether the power of the commissioners to impose an extraordinary rent-charge upon hop-grounds and market-gardens newly cultivated as such is by implication limited to lands in a parish in which a district had been assigned at the time of the original commutation. There certainly is no express limitation; if there be any, it can only be by implication; and I see no sound reason for implying any such limitation. One consequence which

1871

RUSSELL v. TITHE COMMISSIONERS.

would follow if there were such a limitation would be this, that, if there were a newly cultivated hop-ground or market-garden consisting of twenty acres, ten of which were situate in a parish where a district had been assigned and the other ten in an adjacent parish where no district had been assigned, the ten acres in the one parish would be subject to the extraordinary rent-charge, and the ten in the other parish would not. In order to see whether or not such a limitation should be implied, we must look at the scheme of the legislation. The object of having a district assigned was apparently this, that, in the event of the lands ceasing to be cultivated as hop-grounds or market-gardens, they might at once revert to the ordinary charge to which lands cultivated in the less profitable way were subject. The district is to be formed at the request of the land-owner, and for his benefit. The 42nd section of 6 & 7 Wm. 4, c. 71, declares what shall be done on the commutation of the tithes; it enacts that "the amount which shall be charged by any such apportionment as hereinafter provided upon any hop-grounds or market-gardens in any district so to be assigned (s. 40) shall be distinguished into two parts, which shall be called the ordinary charge, and the extraordinary charge, and the extraordinary charge shall be a rate per imperial acre, and so in proportion for less quantities of ground, according to the discretion of the valuers or commissioners, or assistant-commissioner, by whom the apportionment shall be made as aforesaid." The first part of the clause then goes on to enact that "all lands whereof the tithes shall have been commuted under this Act, and which shall cease to be cultivated as hop-grounds or market-gardens at any time after such commutation, shall be charged, after the 31st of December next following such change of cultivation, only with the ordinary charge upon such lands." The second part goes on, "and all lands in any such district the tithes whereof shall have been commuted under this Act, and which shall be newly cultivated as hop-grounds or market-gardens at any time after such commutation, shall be charged with an additional amount of rent-charge per imperial acre, equal to the extraordinary charge per acre upon hop-grounds and market-gardens respectively in that district." Therefore, where lands within the assigned district are brought into cultivation as hop-grounds or market-gardens, they

are to be charged with an additional rent-charge equal to the extraordinary charge in that district. Then comes the third part of the section,—"and an additional rent-charge by way of extraordinary charge upon hop-grounds and market-gardens, newly cultivated as such beyond the limits of every district in which any extraordinary charge for hop-grounds or market-gardens respectively shall be distinguished as aforesaid at the time of the commutation, shall be charged by the commissioners at the time of such new cultivation," "and shall be payable and recoverable in like manner, and subject to the same incidents in all respects, as an extraordinary charge charged upon any hop-grounds or market-gardens at the time of commutation." So far from these latter words being bound up with any district, the mode of charge is left at large. If it had been intended to confine the new charge to lands in a parish where a district had been assigned, I should have expected that the legislature would have referred to the extraordinary charge imposed within that district for the standard. They have not, however, done so.

The late statute of 23 & 24 Vict. c. 93, s. 42, which enables the commissioners to create a new district in respect of lands newly cultivated as hop-grounds or market-gardens, seems to me to bring newly cultivated lands in any parish into the same condition as newly cultivated lands in a parish in which a district had been assigned. Reading the two together, notwithstanding the able argument of Mr. Edlin, I can only come to the conclusion which will give effect to the words of the statutes. I find no express limitation; and I am not satisfied that by necessary implication s. 42 of 6 & 7 Wm. 4, c. 71, ought to be confined to lands newly cultivated as hop-grounds or market-gardens in a parish in which a district had been assigned at the time of the original commutation. The whole question turns upon whether the formation of a district at the time of commutation is a condition precedent. I am not satisfied that it is. I therefore concur with my Brother Willes in giving judgment for the defendants.

Judgment for the defendants.

Attorney for plaintiffs: *J. J. Andrew.*
Attorneys for defendants: *Borrett, White, & Borrett.*

1871
June 23.

TURNER *v.* THOMAS.

Principal and Agent—Set-off of Debt due from Agent—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 39.

7 C.B.(N.S.) 578
582
10 C.P. 696
700

To an action for damages for not accepting goods "to arrive," the defendant pleaded, by way of equitable defence, that the contract was made with one H., who was the agent of and intrusted by the plaintiff with the possession, &c., of the goods, as apparent owner thereof; that H., with the consent of the plaintiff, contracted in his own name, and that the defendant believed him to be the owner, and did not know that the plaintiff was the owner of or interested in the goods, or that H. was an agent; that H. was afterwards adjudicated a bankrupt; that, before the bankruptcy, mutual credit had been given by the defendant and H. in respect of the sale of the goods under the contract and in respect of money payable by H. to the defendant upon accounts stated, &c., before the bankruptcy and before the defendant had notice that H. was acting as agent, claiming a set-off:—

Held, a bad plea,—the action being for unliquidated damages, and the set-off not within the rule in *George* v. *Clagett* (7 T. R. 359).

Declaration upon a contract for the sale by the plaintiff to the defendant of one hundred bales of cotton "to arrive in Liverpool per ship or ships." The first count set out the contract, and alleged for breach that the defendant refused to accept or pay for the cotton. There was a second count, for goods bargained and sold.

Sixth plea, for a defence on equitable grounds, that the contract was entered into by the defendant with one Helder, then being the agent of the plaintiff in that behalf, and who was intrusted by the plaintiff with the possession, order, and disposition of the goods contracted to be sold by the contract, as apparent owner thereof; that Helder entered into the contract for the sale of the goods in his own name, with the consent of the plaintiff, and that at the time of the contract of sale the defendant believed Helder to be the owner of the goods, and did not know that the plaintiff was the owner of them or any of them, or that he was interested therein or in the sale thereof, or that Helder was at all an agent in that behalf; that Helder was afterwards adjudicated a bankrupt, and that before his bankruptcy mutual credit had been and was given by the defendant and Helder in respect of the sale of the goods under the contract and in respect of money payable by Helder to the defendant upon an account stated between the defendant and

Helder, and in respect of goods bargained and sold by the defendant to Helder before the bankruptcy and before the defendant had notice that he was acting as agent under the contract, and that at the respective times of giving and receiving such credit the defendant had no notice of any act of bankruptcy committed by Helder; and that, under the mutual credit given as aforesaid, the amount due and payable to the defendant by Helder at the commencement of the suit was and still remained equal to the amount payable to Helder in respect of the said goods, and which was claimed therein as aforesaid; and the defendant was willing to set off the amount against the claim of the plaintiff to which the plea was pleaded. Demurrer and joinder.

Grantham, in support of the demurrer, submitted that the plea was bad, inasmuch as there were no goods in the possession, order, and disposition of Helder as agent at the time of the contract; and that the claim against which the set-off was pleaded was a claim for unliquidated damages only.

C. Russell, contrà. The principle of *George* v. *Clagett* (1) is, that, where one allows an agent to deal as principal, if he afterwards comes forward to sue, he has no greater rights than his agent had. And in *Sims* v. *Bond* (2) Lord Denman, delivering the judgment of the Court, says: "It is a well-established rule of law, that, where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party." If Helder's principal, therefore, were suing upon this contract, there is good reason for saying that this transaction would have been within the mutual credit clauses of the Bankrupt Acts, or, as it is now called, "mutual dealings:" see *Rose* v. *Hart* (3) and the cases there cited; and see ss. 31 and 39 of 32 & 33 Vict. c. 71. By s. 31, it is declared that "Liability" shall include "any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any

(1) 7 T. R. 359.

(2) 5 B. & Ad. 389, at p. 393.

(3) 8 Taunt. 499.

1871

TURNER v. THOMAS.

express or implied covenant, contract, agreement, or undertaking, whether such breach does or does not occur, or is or is not likely to occur or capable of occurring before the close of the bankruptcy; and generally it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of, money or money's worth, whether such payment be as respects amount fixed or unliquidated, as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies, as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury or as matter of opinion."

Grantham, in reply.

Cur. adv. vult.

On a subsequent day, the plaintiff, at the suggestion of the Court, consented to withdraw the second count of the declaration.

WILLES, J. This was an action by the seller against the buyer upon a contract for the purchase of goods to arrive. The first count of the declaration set out the contract and alleged for breach that the defendant refused to accept or to pay for the goods. There was a second count, which was withdrawn.

The sixth plea, by way of answer on equitable grounds, alleged that the contract was made with one Helder, who was the agent of and intrusted by the plaintiff with the possession, &c., of the goods as apparent owner thereof; that the agent with the consent of the plaintiff contracted in his own name, and that the defendant believed him to be the owner, and did not know that the plaintiff was the owner of or interested in the goods, or that Helder was an agent; that Helder was afterwards adjudicated a bankrupt; that, before the bankruptcy, mutual credit had been given by the defendant and Helder in respect of the sale of the goods under the contract and in respect of money payable by Helder to the defendant upon an account stated, &c., before the bankruptcy and before the defendant had notice that he was acting as agent; and that the amount due by Helder to the defendant equalled the amount payable to him under the contract, and the defendant was willing to set off his claim against the claim of the plaintiff.

The case was argued before my Brother Keating and myself in

1871

TURNER v. THOMAS.

the course of the last term. It was allowed to stand over, partly to give the plaintiff time to consider whether he would withdraw his second count, and partly by reason of the novelty of the question. Neither of the learned counsel has supplied us with any authority upon the question whether the effect of the mutual credit clauses in the Bankruptcy Acts is to be applied as against the principal, in the case of a person dealing with a factor or agent who afterwards becomes bankrupt. The law with respect to the right of set-off by a third person dealing with a factor who sells goods in his own name and afterwards becomes bankrupt, is well established by *George* v. *Clagett.* (1) Where the factor sells in his own name to a third person who buys without notice that he is dealing with an agent, the latter has ordinarily a right to be put in the same position as if the factor was the real principal in the transaction, and may set up against the concealed principal any defence which he may have against the factor. That rule is founded on principles of common honesty. One who satisfies his contract with the person with whom he has contracted ought not to suffer by reason of its afterwards turning out that there was a concealed principal. He who has a set-off pays: Solvit qui compensat: 2 Emerigon, 279. There can be no doubt as to the justice of the principle of *George* v. *Clagett.* (1) Equally within the principles of the mercantile law and the doctrine of set-off, it must be limited to liquidated demands. And, when Lord Mansfield, in *Green* v. *Farmer* (2), treated the statutes of Set-Off (3) as being the introduction of equitable principles into the mercantile law, he did so with reference to the man who was dealing with a person whom he believed to be a principal. He did not suggest that the same remedy or the same mode of settling accounts would be applicable with the principal of one who might afterwards become bankrupt. It was not one of the proximate or direct motives which induced him to deal with the particular man. This is not a case in which a defence is set up against the principal on the ground that there was any actual settlement with the factor, or any claim of set-off against the principal, as in *Hudson* v. *Granger.* (4) Is, then, such an effect to be given to the apparent

(1) 7 T. R. 359.
(2) 4 Burr. 2214, 2221.
(3) 2 Geo. 2, c. 22, S. B.; 8 Geo. 2, c. 24, s. 5.
(4) 5 B. & Ald. 27.

1871

TURNER v. THOMAS.

agency as that the very large extension of the law of set-off in s. 31 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), is to be applied to the case of a principal suing under the circumstances I have mentioned? The 31st section enacts that "demands in the nature of unliquidated damages arising otherwise than by reason of a contract shall not be provable in bankruptcy, and no person having notice of any act of bankruptcy available for adjudication against the bankrupt shall prove for any debt or liability contracted by the bankrupt subsequently to the date of his so having notice." It then goes on, "Save as aforesaid, all debts and liabilities, present and future, certain or contingent, to which the bankrupt is subject at the date of the order of adjudication, or to which he may become subject during the continuance of the bankruptcy by reason of any obligation incurred previously to the date of the order of adjudication, shall be deemed to be debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in bankruptcy." And further it appears by s. 39, that, "where there have been mutual credits, mutual debts, or other mutual dealings between the bankrupt and any other person proving or claiming to prove a debt under his bankruptcy, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of such account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had at the time of giving credit to the bankrupt notice of an act of bankruptcy committed by such bankrupt and available against him for adjudication." The question is whether the extension given by these sections is to be introduced into the law established by *George* v. *Clagett*. (1) I am of opinion in the negative. Assuming that, if the assignees were to bring an action upon the footing of Helder being the real principal, some difficulty might arise in saying that the defendant could rely on a set-off, he having purposely broken his contract in order to create the claim: but, if he could, it would be in respect of an account to be stated on

(1) 7 T. R. 359.

both sides, and it is obvious that the principal would not be able to bring into account any such sums as the defendant here claims to bring into it. The 39th section of 32 & 33 Vict. c. 71 is a section intended for the settlement of all proceedings between the bankrupt and persons dealing with him; and there seems no reason for bringing in persons standing outside, who cannot have the same benefits. It is a settlement appropriate to bankruptcy, and not to persons who are solvent. That is one reason. Another is, that the principle of *George* v. *Clagett* (1) applies only to what may be said to be the proximate motive of dealing with the factor; and the contingency of his bankruptcy and the mode of settling accounts with his assignees cannot be said to have been contemplated. The defence here attempted to be set up is not a defence against the factor, but only a special mode of settling accounts with his assignees upon his bankruptcy, and therefore is not one of the defences falling within the principle of *George* v. *Clagett*. (1) For these reasons I am of opinion that the plea is bad, and that our judgment must be for the plaintiff.

KEATING, J. I entirely concur with what has fallen from my Brother Willes.

Judgment for the plaintiff.

Attorney for plaintiff: *W. A. Crump.*

Attorneys for defendant: *Field, Roscoe, & Co., for Bateson & Co., Liverpool.*

(1) 7 T. R. 359.

1871
June 24.

LIDGETT and Another *v.* SECRETAN.

Marine Insurance—Average Loss; Expense of Repairs not actually done when a subsequent total Loss occurred—Merger—Valued Policy.

The plaintiffs insured their iron ship *Charlemagne*, valued at 20,000*l.*, in a policy for 18,000*l.*, "at and from London to Calcutta, and for thirty days after arrival," and in another policy for 10,000*l.* "at and from Calcutta to London." The defendant underwrote the first policy for 150*l.*, and the second for 100*l.* On her outward voyage, the *Charlemagne* struck upon a reef or bank, and sustained damage, and in order to get her off part of her cargo was jettisoned. She reached Calcutta on the 28th of October, and the unloading of her outward cargo was completed by the 8th of November. She was then taken into a dry-dock for survey and repair. Whilst the repairs were in progress, the outward policy expired; and on the 5th of December the ship was totally destroyed by fire.

The plaintiffs claimed under the outward policy the whole amount of the loss resulting from the ship's striking on the reef, without regard to the extent to which the damage had been made good at the time of the fire; and that, in estimating that amount, they were entitled to include what they would have had to pay for dock-dues and other charges of a like nature for the time the vessel would but for the fire have remained in dock for the purpose of being repaired. (1)

The defendant admitted his liability for an average loss under the outward policy, and for a total loss with benefit of salvage under the homeward policy, and also for dock-dues and other charges actually incurred at the time of the fire: and he had paid into court sufficient to cover the plaintiff's claim so estimated.

Upon a case stated by an arbitrator for the purpose of ascertaining upon what principle the losses upon the two policies (2) were to be assessed:—

Held, that, under the first policy, the assured were entitled to recover the amount of the vessel's depreciation at the expiration of the risk in consequence of the damage she had sustained on the outward voyage, without reference to the sum actually expended on her repairs; and that, under the second policy, they were entitled to recover as for a total loss, without reference to their claim under the first policy.

Quære, whether, in estimating the particular average under the first policy, the customary deduction of "one-third new for old" is applicable to iron vessels?

This was an action brought by the owners of the ship *Charlemagne* upon two policies of insurance upon the ship underwritten by the defendant, the one for a voyage out from London to Cal-

(1) At the suggestion of the Court, the plaintiffs' claim in respect of dock-dues incurred since the fire was abandoned.

(2) The case did not in terms raise any question as to the principle on which the total loss under the second policy was to be assessed. But it was assumed that it was intended to be raised; and the Court in giving judgment disposed of that point also.

cutta and for thirty days there after arrival in safety, and the other at and from Calcutta to London. The vessel struck on a reef on the voyage out, and sustained a particular and general average loss, and whilst at Calcutta, after arrival, was totally destroyed by fire.

The declaration contained counts claiming losses under both policies, including a general average loss under the outward policy; and to these counts the defendant pleaded a single plea of payment into court of 110*l.* in satisfaction of all the plaintiffs' claims. To this the plaintiffs replied that the sum paid in was not sufficient.

The cause came on for trial at the sittings in London after Michaelmas Term, 1868, when a verdict was entered for the plaintiffs, by consent, for the amount claimed in the declaration, subject to the opinion of the Court upon a special case to be settled by C. Pollock, Q.C., upon the question whether when the ship was destroyed by fire she was covered by the outward policy, and also as to the principle upon which the partial loss under the outward policy was to be calculated, in the event of the plaintiffs' being held by the Court not to be entitled to recover a total loss under the outward policy; and, it having been decided by this Court, upon a case stated for that purpose, that the plaintiffs were not entitled to recover for a total loss under the outward policy (1), the following further case was stated, in order to obtain the opinion of the Court as to the principle upon which the partial loss was to be calculated under that policy:—

1. In July, 1866, the plaintiffs, who are ship-owners carrying on business in London, were the owners of the iron sailing vessel *Charlemagne*, then about to proceed upon a voyage from London to Calcutta, and, after certain stay there, back again from Calcutta to London. To cover the vessel on the outward voyage, the plaintiffs effected a policy of insurance, in the ordinary form, with various underwriters, to the amount of 18,000*l.*, upon the ship, valued at 20,000*l.*, and the defendant, who is an underwriter at Lloyd's, underwrote the policy for 150*l.* In order to cover the ship upon the homeward voyage, the plaintiffs effected a further policy, in the ordinary form, with various underwriters, which was subscribed to the amount of 10,000*l.*, on the ship, valued at

(1) Law Rep. 5 C. P. 190.

1871

LIDGETT v. SECRETAN.

20,000*l.*, and the defendant underwrote this policy for 100*l.* In the outward policy the risk was expressed to be "at and from London to Calcutta, and for thirty days after arrival." In the homeward policy, the risk was "at and from Calcutta to London."

2. The *Charlemagne* in the course of her outward voyage struck upon a reef or bank near the mouth of the Hooghly, and remained aground for about an hour. The captain deemed it best for the safety of the vessel, passengers, and cargo, to force the vessel over the bank, and for that purpose to throw overboard some of the cargo, in order to lighten her. Accordingly, a quantity of the cargo was jettisoned, and the ship, being thus lightened, gradually worked over the bank.

3. The ship sustained considerable damage to her bottom and rudder; but the extent of this was not fully known until the survey hereinafter mentioned. She continued her voyage, and reached Calcutta on the 28th of October, and at once proceeded with the discharge of her cargo, which was completed by the 8th of November.

4. On the 12th of November, the *Charlemagne* was taken into dry-dock for survey and repairs.

5. The result of the surveys made upon the *Charlemagne* in the dry-dock shewed that extensive repairs were necessary in consequence of the damage done to the ship while aground. These repairs were accordingly commenced. Whilst they were in progress, the outward policy expired. Afterwards, on the 5th of December, the vessel was totally destroyed by fire.

6. According to the plaintiffs' evidence, the expenses actually incurred amounted to a small proportion of the outlay which would have been required to complete the repairs.

7. The defendant admits that he is liable for a general and particular average loss under the outward policy, and for a total loss, with benefit of salvage, under the homeward policy; and the amount paid into court has been calculated on the supposition that it covers the defendant's proportion of the loss and general average and other expenses actually incurred by the plaintiffs under the outward policy, and the total loss under the homeward policy. The plaintiffs do not admit the correctness of this calculation.

8. The plaintiffs, however, contend that they are entitled under

the outward policy to recover for the whole amount of loss and damage sustained by the ship by striking on the reef, without regard to the extent to which the same was actually repaired and made good.

9. The plaintiffs also contend that, in estimating the cost of repairs for which the defendant is liable under the outward policy, they are entitled to include the amount which the plaintiffs would have had to pay for dock-dues, and other charges of a like nature, for the time during which the vessel would (but for the fire) have remained in the dry-dock for the purpose of being repaired. The defendant contends that, under the outward policy, he is only liable for the amount of dock-dues and charges actually incurred at the time of the fire.

10. In adjusting the amount of the salvage under the homeward policy, the dock-dues incurred since the fire, and which must have been necessarily incurred before realizing the net salvage of the wreck, are deducted from the sale of the wreck.

The question for the opinion of the Court is, what are the true principles upon which the said losses are to be assessed.

The case is to be remitted to the arbitrator to determine whether, adopting the principle so laid down as to the mode of calculating the particular average loss, the said sum of 110*l.* is sufficient to satisfy the plaintiffs' claims in this action; and, if the arbitrator should find that it is not sufficient, then the judgment is to be for the plaintiffs for such sum as the arbitrator shall find that the plaintiffs are entitled to, with costs; but, if the arbitrator should find that the said sum is sufficient, then judgment is to be entered for the defendant, with costs.

Sir G. Honyman, Q.C. (*Watkin Williams* and *Cohen* with him), for the plaintiffs. The plaintiffs are entitled to recover under the first policy to the extent of the diminution in value of the vessel in consequence of the damage she sustained on her voyage out; and this without reference to whether the expense of repairing her was actually incurred or not. Her total destruction after the risk covered by that policy was terminated makes no difference: *Potter* v. *Campbell* (1) is a distinct authority for that. In delivering the

(1) 16 W. R. 399.

1871

LIDGETT v. SECRETAN.

judgment of the Court there, Willes, J., said (1): "I think I ought to mention a matter which was brought under our consideration, though it is scarcely necessary to notice it,—the fact of the vessel having been totally destroyed in the cyclone on October 5th, 1864,—which at one time was said to have the effect of a merger of the partial loss which occurred at Bluff Harbour. I can only say with respect to that, if it be necessary to refer to the doctrine of merger at all, in reality it only comes to this, that, where there is a partial loss and a total loss *on the same voyage*, the underwriter has only to pay for the total loss, and that, in paying for the total loss, he fulfils his contract, and is not to be called upon to pay for a partial loss. With regard to saying that a ship having been totally lost can make the fact that she has been previously partially damaged cease to exist, would be sheer nonsense and utterly out of the question. The doctrine of merger must be limited to a loss happening during the period over which the underwriter's liability extends." Upon the second policy the plaintiffs are entitled to recover as for a total loss, without taking into consideration the partial loss on the first policy. The two contracts are entirely separate and distinct, and the rights of the assured under each are to be ascertained as if the other policy had never existed. The policy being a valued one, the amount to be recovered under it is to be assessed with reference to the sum which the parties have agreed shall be considered as the value of the ship, and without reference to the condition of the ship at the time of the ultimate loss: *Barker* v. *Janson*. (2)

[WILLES, J. The doctrine of merger cannot apply to such a case as this. The reason for applying it where the partial loss and the total loss occur during the continuance of the same risk is obvious: the parties never intended that the insurers should be liable for more than a total loss in any event. But the same reason does not apply where the partial loss takes place during the period covered by one policy and the total loss whilst the ship is insured for a different voyage and under another policy. It would, however, be a strong thing to say that the assured could recover in respect of dock-dues not incurred. (3)]

(1) This passage was read from a short-hand note of the judgment.

(2) Law Rep. 3 C. P. 303.

(3) This part of the claim was ultimately abandoned.

Sir John Karslake, Q.C. (*J. C. Mathew* with him), contrà. *Barker* v. *Janson* (1) was the case of a time-policy, in which there is no implied warranty of seaworthiness. That case, therefore, has no application. This was a voyage policy. The expenses which were not actually incurred were necessary in order to render the ship seaworthy for the voyage home: the underwriters under the second policy are therefore entitled to have that amount deducted from the sum for which they are liable under that policy. The contract of insurance is one of indemnity only. To the extent of the sum which the plaintiffs can recover under the first policy, the underwriters under the second are entitled to be subrogated into their place: see *Quebec Fire Assurance Co.* v. *St. Louis* (2); 2 Arnould on Insurance, 3rd ed. 868. In the notes to *Lewis* v. *Rucker* (3), in Tudor's Mercantile Cases, 2nd ed. 216, the rule as deduced from the cases on this subject is thus stated: "Where the expenses have been actually incurred in the repairs of a ship in her port of distress, and she is totally lost before reaching her port of destination, the cost of such repairs may be recovered in addition to the total loss, either as an average loss or as money expended and labour bestowed about the defence, safeguard, and recovery of the ship: *Le Cheminant* v. *Pearson* (4): but, although a vessel may have sustained an average loss, if no expenses have been actually incurred in repairing it, the assured cannot recover anything for the average loss in addition to the subsequent total loss: see *Stewart* v. *Steele*. (5) There, a vessel, being damaged by a collision, returned to her port of departure, and was re-coppered, and, having sailed again, was compelled to return, and was put into dock, and her wales were removed for the purpose of examining the condition of her timbers. Ultimately, the vessel was found to be so defective as to render it inexpedient to repair her, and she was consequently sold as she lay (the wales not having been replaced), for the purpose of being broken up. It was held by the Court of Common Pleas that the assured was entitled to recover the cost of the re-coppering, in addition to the total loss, but that he was not

(1) Law Rep. 3 C. P. 303.

(2) 7 Moo. P. C. 286. Willes, J., observed that that case appeared from the MS. of Lord Wensleydale to be inaccurately reported.

(3) 2 Burr. 1167.

(4) 4 Taunt. 367.

(5) 5 Scott, N. R. 517.

1871

LIDGETT v. SECRETAN.

entitled to recover anything in respect of the expense which might have been but which was not incurred in replacing the wales. So, in the case of *Livie* v. *Janson* (1), where an American vessel was insured, warranted against American condemnation. After she sailed on her voyage she sustained damage which, had it been repaired, would undoubtedly have fallen upon the underwriters. She was not repaired, and afterwards, being ashore in the St. Lawrence, was captured by the Americans. It was held that the underwriters were not responsible." The question is whether the assured in this case are entitled to recover under the second policy the full value of the ship as if she had been undamaged at the inception of the risk, and also the average loss under the first policy to the extent of the deterioration of the vessel by the accident which happened on her voyage out, although, the repairs not having been done, they had incurred no loss at all under the first policy. This would be manifestly unjust.

[MONTAGUE SMITH, J. The cost of the repairs would be a mode of estimating the amount by which the vessel was depreciated by striking on the reef. The real question is, when are the rights of the assured under the first policy to be ascertained? The case of *Rawlings* v. *Morgan* (2) is very analogous. There, a tenant who was under covenant to keep the premises in repair was sued for dilapidations; and it was held that the landlord was entitled to recover damages to the extent to which the premises had become lessened in value by the defendant's breach of covenant, notwithstanding he had re-let the premises to another tenant, who had covenanted to pull them down and rebuild them, so that to repair them would have been idle.]

Sir G. Honyman, Q.C., in reply. The cases relied for the defendant are cases where the partial loss and the total loss occurred on the same voyage and whilst the risk continued. *Knight* v. *Faith* (3) is in point for the plaintiffs. The policy being a valued one, in the absence of fraud, the assured are entitled under it to recover the agreed value, without any deduction. There can be no subrogation, as suggested. Subrogation only applies to things happen-

(1) 12 East, 648.
(2) 18 C. B. (N.S.) 776; 34 L. J. (C.P.) 185.
(3) 15 Q. B. 649; 19 L. J. (Q.B.) 509.

ing in the course of the same voyage. The rights of the assured under each policy must be dealt with as if the other did not exist.

[WILLES, J. How as to the customary allowance of one-third new for old?]

That is applicable only in the case of wooden ships. It has never yet been applied to an iron one; and many reasons might be suggested why it should not be applied.

WILLES, J. This case involves two questions. It appears that the vessel was insured by one policy on a voyage from London to Calcutta and for thirty days after her arrival there in safety, and also by another distinct policy on a voyage from Calcutta to London. She appears to have sustained damage by striking on a reef on her voyage out; and in respect of that damage there was a partial loss under the first policy. It also appears that, after the expiration of the period for which she was insured by the first policy, and after the second policy had attached, and after the repairs rendered necessary by the accident which occurred on the voyage out had been partially done, but before they had been completed and the damage which the ship had sustained had been entirely made good, she was totally destroyed by fire. The vessel, therefore, which arrived in a damaged state at Calcutta, was worth less than she would have been if the damage had not occurred. A certain amount of the mischief had not been repaired; and this would detract from the value of the vessel. Whilst matters stood thus, her destruction by fire occurred. There is no reference in either policy to the other: they are entirely distinct contracts, and for different voyages. The first policy, which was to cover the voyage out to Calcutta and thirty days after arrival there, stands by itself. Neither party to that contract can justly claim to be absolved from its performance because the other has chosen to enter into another and distinct contract with reference to another voyage; and the circumstance of the defendant in this action being an underwriter on both policies is simply an accident, and cannot make the position of the underwriters on the second policy either better or worse. The rights of the parties with reference to each policy must be determined just as if the other had had no existence at all.

1871

LIDGETT v. SECRETAN.

Let us look at the first policy, and see what are the rights of the plaintiffs under it. As to what was actually done in the way of repairs, no question arises: but the question is, whether the underwriters upon the first policy are liable for particular damage done to the vessel during the existence of that policy, the repairs of which were not actually completed when the ship was destroyed. That raises the question whether the assured can in any case recover from the underwriters in respect of damage sustained by the vessel before any actual expense for repairs has been incurred,—or, in other words, whether the assured is bound to go through the operation of repairing the ship before he brings his action against the underwriters. If in this case the owners had completed the repairs, it would have availed them nothing, by reason of the subsequent destruction of the vessel. To allow that fact to influence our decision would, I think, be reaching a long way and speculating upon results which it is assumed would or might have happened under different circumstances. It is, however, impossible to affirm that but for the damage sustained by the ship on her voyage out the fire would not have occurred. The fact of the ship being kept a long time at Calcutta for the purpose of repairing her may or may not have led to the fire taking place. We cannot affirm that it did; neither can we affirm that it did not: and yet it is apparently contended on the part of the underwriters that we must resort to that fire, and the consequent total loss, in order to relieve them from liability under the first policy.

Let us look a little closer into the matter. The ship at the expiration of the risk covered by the first policy was certainly reduced in value: her owners were worth less, say by 1000*l.*, than they would have been if she had arrived in safety. They had entered into a contract with the underwriters, whereby the latter agreed to indemnify them from damage done to the vessel during the voyage. Is it not a damage to a ship that she is reduced in value from 5000*l.* to 4000*l.*? In such a case, if the owners were dealing with underwriters who were disposed to settle upon just terms as soon as the loss was ascertained, the loss would at once (on the expiration of the policy) be settled at 1000*l.*, and the assured would in the ordinary course receive a cheque for that amount. Suppose the policy to expire on the 31st of December,

and the settlement to take place on the 1st of January, and a cheque for the partial loss given on the 3rd, and the vessel to be burnt on the 4th,—could the underwriters stop the cheque, or bring an action to recover back the amount as upon a failure of consideration? Clearly not. The loss should be considered as settled (subject to amount) when the risk has expired. Take another case: suppose the vessel arrived worth 4000*l.* instead of 5000*l.*, and the owner sells her for 4000*l.* on the 2nd of January, and on the 3rd she is destroyed by fire, and the underwriter were to say, "I only undertook to indemnify you (the assured) against the consequences of certain perils happening during the existence of the policy, and the sale was not one of those perils, and did not take place during the period covered by the policy; I will not pay, because your claim is founded upon something which took place after the expiration of the policy, and by reason of your own act." Would not the answer of the assured be, "I am damnified to the extent of 1000*l.* by a peril insured against, which occurred during the period covered by the policy?" Could the underwriter set up the merger of the partial loss in a total loss occurring after the expiration of the policy? In such a case, the authorities would be called for, and the reasoning upon which they are founded would be considered. The authorities, when looked at, will be found to amount to this:—A partial loss is not paid for if there is a total loss of the vessel during the period covered by the policy; because, when the underwriter pays the total loss, he actually discharges all partial losses occurring during the voyage,—except such as fall within the suing and labouring clause, which are apart from the sum insured. He never stipulated to pay more than the total loss; and, if he were to pay for a partial loss, and also the whole value of the vessel, he would be paying more than he undertook to indemnify the assured against. There is another case, viz. where, after the vessel has sustained damage, but has not been repaired, and has subsequently, and during the currency of the policy, been totally lost by a peril excepted out of the policy, and in respect of which the owner was his own insurer. Such was the case of *Livie* v. *Janson*. (1) In such a case, the assured puts himself in the same position that the underwriter would have been in if he had insured

(1) 12 East, 648.

1871

LIDGETT v. SECRETAN.

against a total loss generally; and therefore, when such loss arises, the underwriter must be considered by the terms of the contract to be in the same position as if he had so insured and had paid for a total loss, and consequently the claim for a partial loss falls to the ground. It appears to me that the authorities and the reasoning upon this subject go together. The former shew that the rule in question is limited to the happening of the total loss during the time covered by the policy; and the reason of the thing applies to the same period. Are we, then, to extend the doctrine of merger to the case of the total destruction of the ship after the expiration of the policy? There is no direct authority upon the subject in the law of insurance: but the case of *Rawlings* v. *Morgan* (1), referred to by my Brother Smith in the course of the argument, is very apposite. There, a tenant who was under covenant to keep the premises in repair left them at the expiration of his term in a dilapidated state; and, in answer to an action for breach of covenant, sought to be absolved from liability for substantial damages, because the lessor had thought fit to enter into a contract with another tenant, under which the premises were to be pulled down and others erected on the site; and so the repairs, if done, would have been useless. That, it is true, was matter of contract, and not mere indemnity.

The period at which the liability of the underwriter on the first policy is to be determined, is, at the expiration of the first risk. Therefore, it is right that he should be held liable for the sum which he ought to have paid at that time, which would be the diminution in value of the vessel by reason of the damage which she had sustained.

I do not think we are called upon to go into details. The only question we are asked to decide is, what are the true principles upon which the loss is to be assessed? The true principle I apprehend to be this:—The owners are not to get anything which they did not lose by the vessel striking on the reef. They are to get the amount of the diminution in value of the vessel at the end of the first risk,—the difference between her then value and what she would have been worth but for the damage she had sustained. In arriving at that result, I do not see how the arbitrator can avoid

(1) 18 C. B. (N.S.) 776; 34 L. J. (C.P.) 185.

taking into consideration the expenses which would have to be incurred in order to put the vessel into a proper state of repair; but he must do this only for the purpose of arriving at the diminution of value at the expiration of the risk. That, of course, must be subject to all proper allowances.

A question has been raised, but not argued before us, as to whether or not the allowance of one-third new for old, which as regards wooden vessels has grown into a custom, is applicable to the case of an iron vessel, which this is. The reason for this allowance in the case of wooden vessels is, that the owner by the repairs gets what is pro tanto equivalent to a new vessel. But, whether or not that customary allowance should be made in the case of iron vessels, I do not think we are called upon to decide. The arbitrator must do the best he can in the matter. This disposes of the first point.

The second point arises upon the second policy, and is one of great importance, and one which has been the subject of much discussion and criticism both by lawyers and legislators; and yet nobody has been able to improve upon the practice as to valued policies which has been recognized and adopted by shipowners and underwriters, and has, at least amongst honest men, the advantage of giving the assured the full value of the thing insured, and of enabling the underwriters to obtain a larger amount of profit. It saves them both the necessity of going into an expensive and intricate question as to the value in each particular case; and its abandonment would in the end, as it seems to me, prove highly detrimental to the interests of the underwriters. Of course, if the sum inserted as the value of the ship were so outrageously large as to make it plain that the assured intended a fraud on the underwriters, the latter would have their remedy. So, if a jury should think the real intention was a wager on the value of the ship. There are many reasons why this system of valuation,—though unquestionably often resorted to for the purpose of evading the law against wagering policies,—is useful. Ships are often insured whilst on a distant voyage, and when their exact condition or value cannot be known or ascertained. It is manifestly important that the owner should be able to insert a fair sum as the value of the vessel, treating her as sound, though she may at the time

1871

LIDGETT v. SECRETAN.

have sustained damage even to the extent of what may ultimately turn out to be a total loss,—that being in fact one of the perils insured against. Another case may be put, viz. the case of an owner fitting out the vessel for a particular adventure, such as the conveyance of troops or emigrants, great expenditure, which does not increase the market value of the ship, being required for the voyage: he may take all that expenditure into consideration in fixing her value in the policy, and may recover it from the underwriters in case of loss. In these and many other cases it is extremely convenient that a fixed and ascertained value should be inserted in the policy as the sum to be paid in the event of a loss. This rule has been applied in a great many cases. The last and the nearest to this is *Barker* v. *Janson*. (1) There, the vessel was insured by a valued time policy, and her value as stated in the policy was 8000*l*. At the time when the policy was made, but unknown to the parties, the ship had sustained damage in a storm, so that the expense of the repairs would have exceeded her value when repaired. During the continuance of the risk, the ship was totally lost. It was held that the policy attached, notwithstanding the previous injury to the ship, and that, there being no fraud, the value stated in the policy was conclusive between the parties. The result of the decisions in this country, as well as in the United States, and, I believe, in North Germany, is, that the value mentioned in the policy is a conventional sum, not representing the real value of the vessel, but the sum to be paid by the underwriters in the event of a loss. It was upon this principle that we held, in *Barker* v. *Janson* (1), that the underwriters could not deduct from the valuation the sum it would have cost to make the vessel fit for sailing. That case would unquestionably have been in point, but for the distinction adverted to by Sir John Karslake. The policy there was a time policy. It was not necessary, therefore, in order to make the policy attach, that the vessel should have been seaworthy at the time. There was no warranty of sea-worthiness. Here, the policy is a voyage policy; and the vessel must have been repaired so as to make her sea-worthy for the voyage home: consequently, Sir John Karslake contended that the parties have stipulated that the vessel should not depart on her voyage home

(1) Law Rep. 3 C. P. 303.

until the repairs had been done. That raises the question whether, on a valued policy like this, the underwriters are entitled to have the expense of those repairs deducted,—in other words, whether they are to pay less where the ship is totally lost while in port than where she is lost at sea. If the vessel had been at sea, and the policy a valued one, had been made after she had sailed, and the vessel had sustained damage, would the underwriters be entitled to say that the particular loss should be deducted from the value in the policy? No authority has been cited for limiting the value to that extent. In the absence of fraud or wagering, it seems to me that the value is to be taken to be the conventional sum to be paid in the event of a loss, whatever the actual value of the vessel might be at the time. It was further said that this sum might be treated as salvage. That would necessarily involve a reference to the former policy, which, as already stated, cannot be made. If the owners had had no insurance on the voyage out, they would have had no sum to hand over by way of salvage. The result is that, in my opinion, we ought at once to give judgment for the plaintiffs.

MONTAGUE SMITH, J. I am of the same opinion. The questions raised in this case seem to me to have been already decided by two cases in this Court, of *Potter* v. *Campbell* (1) and *Barker* v. *Janson*. (2) The action is brought upon two policies of insurance on the plaintiffs' ship *Charlemagne*, one upon the voyage out from London to Calcutta and for thirty days after arrival, and the other upon the homeward voyage at and from Calcutta to London. The facts are, that the vessel struck upon a reef on her outward voyage, received considerable damage, and went on to Calcutta. The repairs rendered necessary by the disaster were commenced, but were not finished when the outward policy expired; and, after the expiration of the first policy, and after the risk under the second policy had attached, the ship was burnt. The defendant, who has underwritten both policies, has paid a sum into court on the supposition that it will cover his proportion as well of the partial as of the total loss. He seems to have paid the money in under the first policy upon the assumption that the plaintiffs are

(1) 16 W. R. 399. (2) Law Rep. 3 C. P. 303.

1871

LIDGETT v. SECRETAN.

entitled under that to recover only in respect of expenses which have been actually incurred in repairing the damage sustained on the outward voyage. The question for the Court is, upon what principle the losses are to be assessed. It seems to me that they are to be assessed upon each policy separately, as if the other did not exist; and that, upon the first policy, the plaintiffs are entitled to recover to the extent to which the ship was deteriorated in value by the happening of the accident, which may be measured by what the repairs necessarily incurred would have cost them. It is material to consider at what time the loss under this policy and the damage sustained by the plaintiffs are to be estimated. It is unnecessary to say whether or not they could have been estimated at an earlier period; but, at all events, the loss became fixed, and a right of action accrued to the plaintiffs at the expiration of the policy. Maule, J., referring to *Blackett* v. *Royal Exchange Association* (1), in *Stewart* v. *Steele* (2), says: "That case establishes this principle, that the proper time to estimate the loss, where the party is put to no expense, is at the expiration of the risk."

It was contended on the part of the defendant that the particular average under the first policy is merged in the subsequent total loss under the second policy. It seems to me that the loss occurring after the expiration of the first policy, and when the second policy had attached, gives nothing in which the partial loss can be merged. No doubt, where both the partial and the total loss occur during the same voyage, and during the period covered by the same policy, the former is merged in the latter. That is so upon obvious principles of justice. The underwriter insures against accidents happening during the voyage; and the whole voyage must be regarded before it can be ascertained whether and to what extent the assured are damnified. But I am at a loss to see how anything which may occur after the expiration of the risk can alter or affect the rights of the parties. In *Knight* v. *Faith* (3) there is a portion of Lord Campbell's judgment which supports this view. He says, (4) "The insurers have not paid, and they deny their liability to pay a total loss; and they are not at liberty to allege that the partial loss is merged in a total loss from which they are

(1) 2 C. & J. 244.
(2) 5 Scott, N. R. 517.
(3) 15 Q. B. 649; 19 L. J. (Q.B.) 509.
(4) 15 Q. B. 668.

exempt." In the present case, the underwriters under the second policy have nothing whatever to do with the partial loss under the first policy. It was a mere accident that there was a second policy; and the rights of the assured on the first policy stand precisely as if the second had never been entered into. It is unnecessary for me to say more as to the liability of the underwriters on the first policy; the principles upon which it rests having been so fully laid down by my Brother Willes, and supported by reasoning and by authority.

Sir John Karslake, however, puts an alternative case. He says, granted that the defendant is liable to pay the particular average under the first policy to the full extent to which the vessel was deteriorated by the accident which occurred upon the outward voyage, still he is entitled to a deduction from the amount secured by the second policy to the extent to which the money not actually expended in repairs will go. This is, in effect, an attempt to open the valuation mentioned in the policy. The ship has been valued in a way which raises no question. A valuation must always be subject to be inquired into. It may be that the ship was of the full value mentioned in the policy at the time it was entered into, and of less value when the risk attached. This may happen from various causes. In the present case, the difference of value arose from the damage which the ship sustained on her outward voyage. It might have been the result of some latent defect in the vessel herself. The apparent excess of indemnity arises entirely from the fact that she was valued in the second policy. It seems to me that it would be contrary to the principle upon which the practice of making valued policies is based, if any of these circumstances could be taken into consideration in order to open the valuation. I feel that it is unnecessary to go further into that question, for it has been so recently considered in this court in the case of *Barker* v. *Janson*. (1) What happened here is very much like what was supposed by my Brother Willes in that case. If the repairs had been completed before the second policy attached, the vessel would have been of the value mentioned in that policy; but that is a fact with which the underwriters on that policy are not concerned, because value is a matter which the parties have liquidated and

(1) Law Rep. 3 C. P. 303.

1871

LIDGETT v. SECRETAN.

ascertained at the time of entering into the contract, and which neither can open. It cannot depend upon the actual value at the time of the loss or at the time the risk attaches.

Upon both grounds, therefore, I think the view taken by the plaintiffs as to the proper principle upon which the damages are to be assessed is the correct one; and it follows that the amount paid into court by the defendant has been assessed upon an erroneous principle.

Judgment accordingly.

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorneys for defendant: *Waltons, Bubb, & Co.*

END OF TRINITY TERM, 1871.

INDEX.

ACCOUNT—Settlement in—Agent - 405
See PAYMENT OVER BY AGENT.

ACCRUING SHARE—*Will—Construction—Specific Devise.*] A testator devised a freehold estate to his son John for life, and after his death to his child or children, if any, in fee; "but, in case my said son John should die without lawful issue, then unto and equally between my sons George and Robert, in the same manner as the estates herein devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned, in case my said son John should leave a widow."—He then devised separate freehold estates to his sons George and Robert in precisely similar terms, mutatis mutandis. Then followed the proviso referred to, in each of the above devises,—"Provided that, in case any or either of my said sons should depart this life leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying, unto his widow and her assigns, for life."—The testator died in 1843. Robert died a bachelor in 1848. John died in 1861, and George in 1867, each leaving a widow, but no children:—*Held*, by Bramwell, Channell, Pigott, and Cleasby, BB.,—reversing the judgment of the Court of Common Pleas,—that the limitation to the widows included only the shares originally and directly devised to John and George:—*Held*, by Kelly, C.B., and Blackburn and Mellor, JJ., that the limitation to the widows included the shares accruing to John and George on the death of Robert, as well as the shares originally and directly devised to John and George. MELSOM *v.* GILES - - - - - Ex. Ch. 532

ACKNOWLEDGMENT BY MARRIED WOMAN—*Deed under 3 & 4 Wm. 4, c. 74—Sealing.*] A deed was sent out to Melbourne under a special commission for execution and acknowledgment by certain married women. When sent out, the deed had pieces of green ribbon attached to the places where the seals should be, but no wax or other material to receive an impression; and it was returned to this country in the same state, but in all other respects duly executed. The attestation clause stated that the deed was "signed, sealed, and delivered," and two of the commissioners certified that the married women produced the deed before them and "acknowledged the same to be their respective acts and deeds":—*Held*, that there was sufficient primâ facie evidence that the deed was sealed, to warrant the Court in allowing it to be received and filed with the other documents by the proper officer, under 3 & 4 Wm. 4, c. 74. *In re* SANDILANDS - 411

ACT DONE IN PURSUANCE OF STATUTE—Notice of action - - - 474
See NOTICE OF ACTION.

ACT OF BANKRUPTCY—Assignment of debtor's property - - - - 107
See ASSIGNMENT OF ALL DEBTOR'S PROPERTY.

ACTION—Notice of - - - - 474
See NOTICE OF ACTION.

AFFIDAVIT—Bill of sale - - - 98
See AFFIDAVIT WITH BILL OF SALE.

AFFIDAVIT WITH BILL OF SALE—17 & 18 *Vict. c.* 36, *s.* 1—*Affidavit filed on Registration—Description of Occupation of Attesting Witness.*] The attesting witness to an instrument within the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), was clerk to an attorney at the time of its execution, and was described as such in the attestation clause. The affidavit filed with the bill of sale on registration was made by the attesting witness, and after verifying his signature to the bill of sale as attesting witness, described him as a gentleman residing at No. 3, Bramah Road, Brixton, in the county of Surrey:—*Held*, that the affidavit was insufficient, inasmuch as it did not, either directly or indirectly, by reference to the bill of sale, contain a description of the occupation of the attesting witness as required by the Bills of Sale Act, s. 1, and that the bill of sale was therefore void as against an execution creditor. BRODRICK *v.* SCALE - - - 98

AGENT—Contract—Disclosed principal
See CONTRACT BY AGENT. [Ex. Ch. 486

—— Insurance company—Report - - 252
See INSPECTION OF DOCUMENTS.

—— Payment over to principal - - 405
See PAYMENT OVER BY AGENT.

—— Set-off of debt - - - - 610
See SET-OFF OF DEBT OF AGENT.

AGREEEMENT TO REFER—*Practice—Stay of Proceedings—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125, *s.* 11)—*Costs—Variation of Order after Award.*] An order was made at chambers, under the 11th section of the Common Law Procedure Act, 1854, staying proceedings in

AGREEMENT TO REFER—*continued.*
an action brought on a contract containing an agreement to refer disputes arising thereunder. The order made no provision as to the costs of the action. The matter in dispute being afterwards referred to arbitration, an award was made in favour of the plaintiffs:—*Held* (Per Bovill, C.J., Byles and Montague Smith, JJ.; Brett, J., dissenting), that there was jurisdiction under the 11th section, after the award had been made, to make an order varying the terms of the original order by directing that the defendant should pay the costs of the action. Bustros *v.* Lenders [259

ALLOTMENT OF SHARES—*Joint Stock Company—Shareholder.*] R. agreed with the directors of an assurance association to become their local manager for a particular district. As a condition of his being appointed to that office, it was required that he should take twenty-five shares in the association. R. accordingly applied for that number of shares, and they were allotted to him, and his name was placed upon the register of shareholders, he having paid the deposit of 1*l.* per share. He was thereupon appointed manager, and notice of the appointment was given to and accepted by him:—*Held*, that these facts disclosed a sufficient allotment, and notice thereof to R.; and the Court refused to remove his name from the register of shareholders. Richards *v.* The Home Assurance Association - - 591

AMALGAMATION OF COMPANIES—*Banking Company—Action for Calls—Estoppel by Conduct—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.] Two incorporated banking companies, the Bank of Hindustan and the Imperial Bank of China (under the powers contained in their respective articles of association), agreed to amalgamate, the business of the latter company being transferred to the former, and the shareholders in the Imperial Bank of China having the option of taking newly-created shares in the Bank of Hindustan at a premium, part of which was to be paid out of the funds of the Imperial Bank. The Bank of Hindustan issued circulars informing the shareholders in the Imperial Bank of the arrangement which had been made, and intimating to them that they had an option to take such new shares on the terms specified. The defendant, a shareholder in the Imperial Bank, in consequence, in 1864, applied for and obtained an allotment of twenty-five shares, paid a portion of the deposit and premium thereon, and by his letter of application engaged to pay the residue on a given day. Several calls were afterwards made, of which the defendant had notice; but he never repudiated his liability until an action was brought against him in 1867 for non-payment of those calls.—In 1868, the supposed amalgamation of the two banks was by a decree of a Vice-Chancellor, in a suit by dissentient shareholders in the Imperial Bank, declared to be void:—*Held*, that the directors of the Bank of Hindustan had no power to issue the new shares, and that the defendant was not by any acquiescence or conduct on his part estopped from denying that he was a shareholder in the Bank of Hindustan. The Bank of Hindustan, China, and Japan *v.* Alison
54, Ex. Ch. 222

AMENDMENT—Description of qualification 281
See Vote for Parliament. 8.
—— Order to refer—Costs - - - 259
See Agreement to Refer.
APPEAL—County Court—Death of respondent
See County Court Appeal. [480
—— Exchequer Chamber—Costs - - 461
See Costs of Appeal to Exchequer Chamber.
—— Poor-rate—Next practicable sessions - 414
See Appeal to Quarter Sessions.

APPEAL TO QUARTER SESSIONS—*Poor-rate—Union Assessment Act* (27 & 28 *Vict. c.* 39)—*Notice of Appeal—Next Practicable Sessions—Prohibition.*] A poor-rate was made for the township of Everton on the 8th of July, 1870. The Liverpool United Gas Co., being dissatisfied therewith, on the 3rd of August applied to the union assessment committee for relief; but the committee declined to grant it. The next sessions for the borough of Liverpool were held on the 1st of September, but no appeal against the rate was then entered. The company, having given the twenty-one days' notice required by the Union Assessment Act (27 & 28 Vict. c. 39), s. 1, moved to enter an appeal against the rate at the sessions held on the 26th of October, contending that the sessions of September were not the next *practicable* sessions after the decision of the assessment committee, inasmuch as it would leave them only six days before the twenty-one days, which was not a sufficient time to enable them to determine whether they would appeal or not. The recorder, yielding to this argument, allowed the appeal to be entered and respited at the October sessions:—*Held*, that it was competent to this Court to review the decision of the recorder, upon a motion for a prohibition; and that he was wrong in holding the September sessions not to be the next practicable sessions, and consequently that he had no jurisdiction to entertain the appeal at the October sessions. The Liverpool United Gaslight Company *v.* The Overseers of Everton [414

APPRENTICESHIP—Death of master - 78
See Contract for Personal Services.
ARBITRATION—Agreement to refer—Costs 259
See Agreement to Refer.
—— Revocation of submission - - 212
See Revocation of Submission.
ARCHITECT—Certificate—General line of buildings - - - - - - 87
See General Line of Buildings.
ASSIGNEE OF TERM—County vote - 267
See Vote for Parliament. 6.
ASSIGNMENT OF COPYRIGHT - - 523
See Joint Authorship.

ASSIGNMENT OF ALL DEBTOR'S PROPERTY—*Bankruptcy, Act of—Fresh Advance—Power to seize after-acquired Property—Liquidation by Arrangement*—32 & 33 *Vict. c.* 71, *s.* 125.] A bill of sale including all the existing property of a trader, and containing a power to seize all after-acquired property with a certain exception, was made by him in favour of a creditor, in consideration partly of an existing debt and partly of a sum advanced by such creditor. This advance

ASSIGNMENT OF ALL DEBTOR'S PROPERTY—*continued.*

consisted of a sum paid to another creditor in satisfaction of a debt secured by a previous bill of sale over the same property, for the purpose of redeeming the property which he had already seized under such bill. More than twelve months after the date of the previous bill of sale proceedings were taken for a liquidation of the debtor's affairs by arrangement, under the 125th section of the Bankruptcy Act, 1869, and a trustee was appointed :—*Held*, that the later bill of sale was not an act of bankruptcy.—*Quære*, whether there is any relation back to an act of bankruptcy in cases of liquidation by arrangement.—*Graham* v. *Chapman* (12 C. B. 85; 21 L. J. (C.P.) 173) commented upon. Lomax *v.* Buxton - 107

ASSIGNMENT OF DISTRICT FOR TITHES—*Tithe Commutation Acts* (6 & 7 *Wm.* 4, *c.* 71, *ss.* 40, 42, *and* 23 & 24 *Vict. c.* 93, *s.* 42)—*Extraordinary Charge in respect of Hop-grounds and Market-gardens.*] Under the Tithe Commutation Act (6 & 7 Wm. 4, c. 71), ss. 41, 42, the tithe commissioners have power to create or assign a new district and to impose an extraordinary rent-charge upon lands newly cultivated as hop-grounds or market-gardens in a parish in which no district had been assigned at the time of the original commutation. Russell *v.* The Tithe Commissioners - 596

ASSIGNMENT OF ERROR—*Error in Fact—Assignment of Facts for Error which might have been pleaded—Husband and Wife.*] A judgment having been recovered by plaintiffs, suing as husband and wife, the defendants afterwards brought error in fact, assigning as error that, before the pretended marriage of the plaintiffs, the female plaintiff had intermarried with another man, who still remained alive :—*Held*, that such assignment of error was bad, inasmuch as the facts composing it might have been pleaded, and the defendants were therefore not entitled to take advantage of them by way of error. Metropolitan Railway Company *v.* Edward and Harriet Wilson - - 376

ATTACHMENT—Contempt—Interrogation 105
See Attachment for Contempt.

—— Mayor's Court - - - - 142
See Mayor's Court, Jurisdiction.

ATTACHMENT FOR CONTEMPT—*Practice—In not answering Interrogatories—Waiver of Right to have answered.*] Interrogatories having been delivered to the defendant, in an action of detinue, and still remaining unanswered, a judge's order was made by consent, whereby the plaintiff was to be at liberty to sign final judgment for 1000*l.* damages and costs, on the terms that execution was not to issue if the goods detained were delivered up within a certain time. The plaintiff signed final judgment, and the goods not being delivered up, obtained an order for the issue of execution for return of the chattels detained. An application under these circumstances having been made for an attachment against the defendant for not answering the interrogatories :—*Held*, that the consent to the final judgment was an abandonment by the plaintiff of his right to have the interrogatories answered, and that the application must therefore be refused. Hayne *v.* Pratt [105

ATTESTING WITNESS—Bill of sale - 98
See Affidavit with Bill of Sale.

AUTHORITY—Directors—Amalgamation 54, (Ex. Ch.) 222
See Amalgamation of Companies.

—— Husband and wife—Necessaries - 38
See Necesssaries for Wife.

AUTHORITY OF PARTNER—Banking account [443
See Partner's Authority.

AUTHORITY OF SOLICITOR—Executor - 440
See Authority to postpone Execution.

AUTHORITY TO POSTPONE EXECUTION—*Attorney and Client—Authority of Attorney after Judgment—Agreement to postpone Execution.*] An attorney retained for the conduct of an action has no implied authority, after judgment in favour of the client, to enter into an agreement on his behalf to postpone execution. Lovegrove *v.* White - - - - - - 440

AVERAGE LOSS—*Marine Insurance—Repairs not actually done when a subsequent total Loss occurred—Merger—Valued Policy.*] The plaintiffs insured their iron ship *Charlemagne*, valued at 20,000*l.*, in a policy for 18,000*l.*, "at and from London to Calcutta, and for thirty days after arrival," and in another policy for 10,000*l.* "at and from Calcutta to London." The defendant underwrote the first policy for 150*l.*, and the second for 100*l.*—On her outward voyage, the *Charlemagne* struck upon a reef or bank, and sustained damage, and in order to get her off part of her cargo was jettisoned. She reached Calcutta on the 28th of October, and the unloading of her outward cargo was completed by the 8th of November. She was then taken into a dry-dock for survey and repair. Whilst the repairs were in progress, the outward policy expired; and on the 5th of December the ship was totally destroyed by fire.—The plaintiffs claimed under the outward policy the whole amount of the loss resulting from the ship's striking on the reef, without regard to the extent to which the damage had been made good at the time of the fire; and that, in estimating that amount, they were entitled to include what they would have had to pay for dock-dues and other charges of a like nature for the time the vessel would but for the fire have remained in dock for the purpose of being repaired.—The defendant admitted his liability for an average loss under the outward policy, and for a total loss with benefit of salvage under the homeward policy, and also for dock-dues and other charges actually incurred at the time of the fire: and he had paid into court sufficient to cover the plaintiff's claim so estimated.—Upon a case stated by an arbitrator for the purpose of ascertaining upon what principle the losses upon the two policies were to be assessed :—*Held*, that, under the first policy, the assured were entitled to recover the amount of the vessel's depreciation at the expiration of the risk in consequence of the damage she had sustained on the outward voyage, without reference to the sum actually expended on her repairs; and that, under the second policy, they were entitled to recover as for a total loss, without reference to their claim under the first policy.—At the suggestion of the Court, the plaintiffs' claim in respect of dock-dues incurred

AVERAGE LOSS—*continued.*
since the fire, was abandoned.—*Quære*, whether, in estimating the particular average under the first policy, the customary deduction of "one-third new for old" is applicable to iron vessels? Lidgett *v.* Secretan - - - - 616

BAILMENT—Statute of Limitations - 206
See Limitations, Statute of.

BANKING ACCOUNT—Authority to open - 433
See Partner's Authority.

BANKING COMPANY—Amalgamation [54, Ex. Ch. 222
See Amalgamation of Companies.

BANKRUPTCY — Assignment of debtor's property - - - - - 107
See Assignment of all Debtor's Property.

—— Colonial judgment - - - 228
See Lex Loci.

—— Creditors' deed—Liability of trustee - 1
See Trustee under Inspectorship Deed.

—— Set-off—Debt of agent - - - 610
See Set-off of Debt of Agent.

BENEFIT BUILDING SOCIETY—County vote 292
See Vote for Parliament. 9.

BILL OF EXCHANGE—Mayor's court—Jurisdiction - - - - - - 142
See Mayor's Court Jurisdiction.

BILL OF SALE—Affidavit - - - 98
See Affidavit with Bill of Sale.

—— Consideration—Act of Bankruptcy - 107
See Assignment of all Debtor's Property.

—— Registration - - - - - 144
See Registration of Bill of Sale.

BOROUGH VOTE—Part of house - 315, 327
See Vote for Parliament 3, 4.

—— Payment of rates - - - 365
See Vote for Parliament. 5.

—— Residence—Lodger - - 309, 312
See Vote for Parliament. 1, 2.

BROKER—Contract—Disclosed principal
See Contract by Agent. [Ex. Ch. 486

BURIAL ACTS—Burial-ground established under
See Burial-ground. [445

BURIAL BOARD—Power of - - - 445
See Burial-ground.

BURIAL-GROUND—*Burial Acts—Sexton, Right of, to enter Burial-ground to perform Duties without Consent of the Burial Board—Deputy*—15 & 16 *Vict.* c. 85, *s.* 32.] The 32nd section of 15 & 16 Vict. c. 85, preserves to the sexton of a parish the right of performing, in the burial-ground established under that Act, his duties as sexton in respect of the burial of parishioners and inhabitants of the parish; and the burial board are not entitled to refuse to allow him to perform those duties on the ground that they choose to have them performed by their own servants. The sexton can, therefore, justify an entry on the ground, notwithstanding the board's refusal to admit him, in order to perform his duties under circumstances in which he would have been entitled to perform similar duties in the old parish burying-ground.—It is the intention of 15 & 16 Vict. c. 85, that the burials of parishioners in the consecrated part of the new burial-ground, established under that Act, shall be conducted with the same ceremonies and in the same manner as they would have been in the old parish burying-ground, and the effect of the 30th and 32nd sections, taken together, is to make the chapel erected in the consecrated part of the new burial-ground a substitute for the parish church for the purposes of such burials. The sexton is, therefore, entitled to toll the bell in the chapel at such burial, the tolling of the bell being part of the burial rite of the Church of England.—The sexton may delegate the performance of his duties to a deputy. The Burial Board of St. Margaret, Rochester *v.* Thompson - - - - - 445

CALLS—Amalgamation of companies 54, Ex. Ch. 222
See Amalgamation of Companies.

CARRIER—Railway company—Passenger's luggage - - - - - - 44
See Passenger's Luggage.

—— Railway company—Undue pressure 194, 554
See Railway and Canal Traffic Act, 1854.

CASES—*Bauman* v. *St. Pancras* (Law Rep. 2 Q. B. 528) discussed - - - 87
See General Line of Buildings.

—— *Beamish* v. *Stoke* (11 C. B. 29; 31 L. J. (C.P.) 9) considered - - 292
See Vote for Parliament. 9.

—— *Buckland* v. *Johnson* (15 C. B. 145; 23 L. J. (C.P.) 204) - - - - 584
See Judgment in Trover.

—— *Clarke* v. *Stanford* (Law Rep. 6 Q. B. 357) followed - - - - 481
See Hackney Carriage. 1.

—— *Cook* v. *Humber* (11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73) commented upon - 327
See Vote for Parliament. 4.

—— *Copland* v. *Bartlett* (6 C. B. 18; 15 L. J. (C.P.) 56) considered - - 292
See Vote for Parliament. 9.

—— *De Rothschild* v. *Shilston* (8 Ex. 503; 22 L. J. (Ex.) 279) observed upon - - 116
See Change of Venue.

—— *George* v. *Clagett* (7 T. R. 359) referred to.
See Set-off of Debt of Agent. [610

—— *Graham* v. *Chapman* (12 C. B. 85; 21 L. J. (C.P.) 173) commented upon - 107
See Assignment of all Debtor's Property.

—— *Hirst* v. *Tolson* (2 Mac. & G. 134; 19 L. J. (Ch.) 441) discussed - - 78
See Contract for Personal Services.

—— *King* v. *Hoare* (13 M. & W. 494) - 584
See Judgment in Trover.

—— *Leete* v. *Hart* (Law Rep. 3 C. P. 322) explained
See Notice of Action. [474

—— *Mayor of London* v. *Cox* (Law Rep. 2 H. L. 239) followed - - - 142
See Mayor's Court Jurisdiction.

CASES—*continued.*

—— *In re Palmer and London and South Western Ry. Co.* (Law Rep. 1 C. P. 588) observed upon - - - - - 194
See Railway and Canal Traffic Act, 1854. 1.

—— *Peek* v. *North Staffordshire Ry. Co.* (4 B. & S. 627) commented on - - 461
See Costs of Appeal to Exchequer Chamber.

—— *Redpath* v. *Wigg* (Law Rep. 1 Ex. 335) followed - - - - - 1
See Trustee under Inspectorship Deed.

—— *Rex* v. *Keating* (1 Dowl. 440) followed 245
See Costs of Prohibition.

—— *Robinson* v. *Dunkley* (15 C. B. (N.S.) 478; 33 L. J. (C.P.) 57) followed - 292
See Vote for Parliament. 9.

—— *St. George, Hanover Square* v. *Sparrow* (16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118) followed,
See General Line of Building. [87

CERTIFICATE—Election judge - - - 147
See Report of Election Judge.

CERTIFICATE OF ARCHITECT—General line of buildings - - - - - 87
See General Line of Buildings.

CHANGE OF VENUE—*Practice.*] The venue will not be changed from the place where the plaintiff has laid it unless it be shewn that there will be a manifest preponderance of convenience in trying the cause elsewhere; and, where a judge at chambers has refused to change it, a strong case will be required to induce the Court to interfere. —A cause of action arose in London. The venue was laid in Middlesex. The Court refused to change it to London, upon an affidavit that the plaintiff and the defendants and their witnesses (to prove a custom of trade) all had their places of business within a few minutes' walk of Guildhall, and that there would be great difficulty in procuring their attendance at Westminster,—the master and a judge at chambers having already exercised their discretion and refused an order.—Per Willes, J. The supposed resolution as to the change of venue referred to in *De Rothschild* v. *Shilston* (8 Ex. 503; 22 L. J. (Ex.) 279) has not received the sanction of the judges. Church *v.* Barnett - - 116

CHARTERPARTY—Breach—Measure of damage 424
See Damages for Breach of Charterparty.

CHATTEL RENT-CHARGE—County vote - 267
See Vote for Parliament. 6.

COLONIAL JUDGMENT—Bankruptcy - 228
See Lex Loci.

COMMON CARRIER—Railway company—Passenger's luggage - - - 44
See Passenger's Luggage.

COMPANY—Amalgamation - 54, Ex. Ch. 222
See Amalgamation of Companies.

—— Scire facias - - - - 576
See Scire Facias.

—— Shares—Allotment - - - 591
See Allotment of Shares.

COMPANIES' ACT, 1862 - 54, Ex. Ch. 222
See Amalgamation of Companies.

CONDITION—Release - - Ex. Ch. 180
See Confession of Plea.

CONDITIONS OF SALE— *Vendor and Purchaser—Contract for the Sale of Land—Unreasonable Conditions.*] The plaintiff contracted to purchase of the defendant the lease, &c., of a public-house, by a memorandum in the following form:—"Received of Mr. Moeser the sum of 80*l.*, being the deposit on account of 800*l.*, the purchase-money for the Wheat Sheaf Tavern, the contract for which is now being prepared, to be signed by the vendor and purchaser when completed and ready for signature. B. B. Wisker."—The contract tendered to the plaintiff for signature contained, amongst others, stipulations that the purchaser should pay the expenses of the investigation of the vendor's title, and that, if the purchaser should insist on any objection or requisition as to title which the vendor should be unable or unwilling to remove or comply with, the vendor might annul the sale, and return the deposit, but without any interest or costs of investigating the title; and if the purchaser should fail to comply with the above conditions his deposit should thereupon be forfeited to the vendor, who should be at liberty to re-sell the property.—The plaintiff refused to sign this contract, on the ground that it contained unreasonable terms, and the defendant re-sold the property:—*Held*, that the plaintiff was entitled to recover back his deposit. Moeser *v.* Wisker - - - - - - 120

CONFESSION OF PLEA—*Pleading—Rules* 22 *and* 23 *of T. T.* 1853—*Estoppel—Release subject to Condition subsequent—Composition-deed under Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134).] To an action on a bill of exchange, the defendant pleaded that the plaintiff sued him in a former action for the same cause, to which the defendant, on the 3rd of November, 1868, pleaded to the further maintenance of the action a deed of composition under the Bankruptcy Act, 1861, dated the 8th of October, 1868 (which was after action brought), whereby the defendant covenanted to pay his creditors 1*s.* in the pound by two instalments of 6*d.* each on the 6th of April and 6th of August, 1869, in consideration of which the creditors released the defendant from their several debts, with a proviso that, if default should be made by the defendant in payment of the composition, the deed should become void and the creditors should not be bound by the covenants therein contained; that, on the 13th of April, 1869, the plaintiff replied that the defendant failed to pay the instalment due on the 6th of April, 1869, whereby the deed and the release therein contained became void; that the defendant rejoined equitably that the 6th of April, 1869, was subsequent to the date of the plea, and that he had by mere mistake omitted to pay the instalment on that day, but before replication, viz., on the 8th of April, 1869, he tendered it to the plaintiff; that, on the 25th of May, 1869, the plaintiff confessed the plea, withdrew his replication, and taxed and received his costs, and so the first action was finally determined against the plaintiff (except as aforesaid); and that the plaintiff was estopped from bringing a fresh action for the same cause.—Re-

CONFESSION OF PLEA—*continued.*

plication, that the plaintiff ought to be admitted to implead the defendant, by reason of the defendant's failure in the due payment of the instalment of the composition on the 6th of April, 1869, whereby the release became null and void. Demurrer:—*Held*, by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the effect of the confession of the plea in the former action, under rules 22 and 23 of Trinity Term, 1853, was to put an end to the litigation altogether as it stood at the time of the confession; that the plaintiff might have replied in the former action that the release, which was itself after action, though operative when pleaded, became avoided by non-payment of the composition; and that, having omitted to avail himself of the opportunity of doing so, the plaintiff was estopped from relying upon it in a second action.—A release may be made subject to a condition subsequent:—*Semble* (per Blackburn, J.), such a release is, in effect, a covenant not to sue, and is pleadable to avoid circuity of action.—*Semble* (per Martin, B.), that the plaintiff would have been equally estopped if the non-payment of the composition had been after the confession of the plea:—(Per Bramwell, B., and Blackburn, J.), that the plaintiff would not in that case have been estopped. NEWINGTON *v.* LEVY - **Ex. Ch. 180**

CONSIDERATION—Contract—Apprenticeship **78**
See CONTRACT FOR PERSONAL SERVICES.

CONSTRUCTION—Statute - - - **125**
See SERJEANTS' INN

—— Statute - - - - - **384**
See PREFERMENT ANNEXED TO DEANERY.

—— Will—Accruing share - - **Ex. Ch. 532**
See ACCRUING SHARE.

—— Will—Repugnant provision - - **500**
See REPUGNANT PROVISIONS IN WILL.

CONTEMPT—Attachment—Interrogatories **105**
See ATTACHMENT FOR CONTEMPT.

CONTRACT—Agent—Disclosed principal
See CONTRACT BY AGENT. [**Ex. Ch. 486**

—— Apprenticeship—Failure of consideration [**78**
See CONTRACT FOR PERSONAL SERVICES.

CONTRACT BY AGENT—*Principal and Agent—Contract with Broker when Principal disclosed—Parol Evidence—Election*] C., a broker, was authorized by the defendant to buy cotton for him, but not to disclose his name. C.'s credit not being good enough to enable him to obtain a contract upon his own sole responsibility, he gave the plaintiffs the name of his principal, and bought and sold-notes were exchanged between the plaintiffs and C., in which the latter was named as the buyer. C. sent the defendant an advice-note informing him that he had bought the cotton of the plaintiffs "for him," and the defendant did not repudiate the transaction. An invoice was made out to C., and, the market falling, C. was called upon by the plaintiffs to accept and pay for the cotton, and threatened with legal proceedings. Failing to obtain payment from C., the plaintiffs sued the defendant:—*Held*, that the fact of the defendant's name being disclosed at the time of the contract did not preclude the plaintiffs from

CONTRACT BY AGENT—*continued.*

having recourse to him; that parol evidence of the circumstances under which the contract was made was admissible; and that the insertion of C.'s name in the contract, though his principal was known at the time, and the subsequent demands upon C. for payment, did not necessarily amount to an election on the part of the plaintiffs to give credit to C., and to him only.—Judgment affirmed in the Exchequer Chamber. CALDER *v.* DOBELL - - - - - **Ex. Ch. 486**

CONTRACT FOR PERSONAL SERVICES—*Apprenticeship—Death of Master during Term—Return of Premium—Failure of Consideration—Money had and received.*] The plaintiff apprenticed his son to a watchmaker and jeweller for the term of six years, paying to the master a premium of £25. The master duly instructed the apprentice for a year, and then died. The plaintiff sought, in an action against the master's executrix for money had and received, to recover the whole or some part of the premium, on the ground of failure of consideration;—*Held*, that such failure being only partial, the action was not maintainable.—*Hirst* v. *Tolson* (2 Mac. & G. 134; 19 L. J. (Ch.) 441) discussed. WHINCUP *v.* HUGHES [**78**

CONTRACT OF SALE—Conditions - - **120**
See CONDITIONS OF SALE.

CONTRIBUTORY NEGLIGENCE—Innkeeper—Loss of goods - - - **515**
See INNKEEPER.

CONVERSION—Statute of Limitations - **206**
See LIMITATIONS, STATUTE OF

COPYRIGHT—Dramatic—Joint authorship **523**
See JOINT AUTHORSHIP.

CORRUPT PRACTICE AT ELECTIONS—Petition—Report of judge - - - **147**
See REPORT OF ELECTION JUDGE.

COSTS—Action on lost bill - - - **466**
See COSTS OF ACTION ON LOST BILL.

—— Agreement to refer - - - **259**
See AGREEMENT TO REFER.

—— Appeal—Exchequer Chamber - - **461**
See COSTS OF APPEAL TO EXCHEQUER CHAMBER.

—— Prohibition - - - - **245**
See COSTS OF PROHIBITION.

COSTS OF ACTION ON LOST BILL—*Practice—Lost Bill—Costs—Indemnity—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 87.] The defendants in an action on a bill of exchange, pleaded the loss of the bill by the plaintiffs. The plaintiffs, who had offered no indemnity to the defendants before action, sought under the 87th section of the Common Law Procedure Act, 1854, to get the pleas setting up the loss of the bill struck out, on their giving an indemnity to the defendants against any claims by other persons on the bill.—The Court made it a term of the order granting the relief prayed for by the plaintiffs that they should pay the defendants' costs of the action. KING *v.* ZIMMERMAN. - - - - **466**

COSTS OF APPEAL TO EXCHEQUER CHAMBER—*Practice—Affirmance of Court below by Exchequer Chamber, and Reversal by House of Lords.*] The plaintiff in action having obtained a verdict,

COSTS OF APPEAL TO EXCHEQUER CHAMBER —*continued.*

a rule to enter a nonsuit was afterwards made absolute. The plaintiff appealed to the Exchequer Chamber, which affirmed the decision of the Court below. He then appealed to the House of Lords, which reversed the decision of the Exchequer Chamber, making no order as to costs of the appeal to that Court. Upon taxation the master refused to allow the plaintiff his costs of the appeal to the Exchequer Chamber:—*Held*, on application to the Court to review the taxation, that he was right in so refusing.—*Peek* v. *North Staffordshire Ry. Co.* (4 B. & S. 627) commented upon. Gann *v.* Johnson - - - - 461

COSTS OF PROHIBITION—*Practice*—1 *Wm.* 4, *c.* 21, *s.* 1—"*Judgment.*"] The statute 1 Wm. 4, c. 21, s. 1, does not entitle the applicant for a prohibition to his costs where the rule for a prohibition is made absolute without pleadings, as in such case there is no "judgment" within the meaning of the section.—*Rex* v. *Kealing* (1 Dowl. 440) followed. *Ex parte* The Overseers of Everton - - - - - 245

COUNTY COURT—Appeal—Death of Respondent *See* County Court Appeal - [483

COUNTY COURT APPEAL—*Practice—Death of Respondent.*] Judgment having been given for the defendant in an action of ejectment in the county court, the plaintiff appealed to a superior court. Before the hearing of the appeal the defendant died:—*Held*, that the death of the defendant did not deprive the plaintiff of his right of appeal, and that the Court would proceed by analogy to the 166th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), and would allow the plaintiff to proceed with the appeal after giving a notice similar to that required by that section. Hemming *v.* Williams - - - - 480

COUNTY VOTE—Chattel rent-charge - 267
See Vote for Parliament. 6.

—— Freehold rent-charge - - - 281
See Vove for Parliament. 8.

—— List of 12*l.* occupiers - - - 272
See Vote for Parliament. 7.

—— Mortgage - - - - 292
See Vote for Parliament. 9.

COVENANT NOT TO SUE—Creditors' deed 228
See Lex Loci.

COVENANT TO PAY TAXES AND ASSESSMENTS—*Landlord and Tenant—Lease—Tithe Rent-charge.*] The lessor of certain lands was, at the date of the lease, also owner of the tithe rent-charge upon such lands.—The lease contained a covenant by the lessee to pay "all taxes and assessments whatsoever for or in respect of the said demised premises, save and except the level tax, property tax, and land tax," which were to be paid by the lessor:—*Held*, in an action upon the covenant by the plaintiffs, who were assignees of the reversion and of the tithe rent-charge, against the lessee for nonpayment of tithe rents, that the words "taxes and assessments" in the covenant did not include tithe rent-charge, and that the action was therefore not maintainable. Jeffrey v. Neale - - - - 240

CREDITORS' DEED—Bankruptcy—Colonial judgment - - - - - 228
See Lex Loci.

—— Liability of trustee - - - 1
See Trustee under Inspectorship Deed.

CUMULATIVE REMEDIES—Paving expenses
See Recovery of Paving Expenses. [247

"DAMAGES FOR BREACH OF CHARTER-PARTY"—*Refusal to name a Place of Delivery—Measure of Damages—Freight—Demurrage.*] By a charterparty the owner was to carry a cargo of coals to London, and there deliver the same "at a good and safe wharf" to the freighter or assigns, paying freight 6*s.* per ton, &c. One market-day to be allowed for sale, or 1½*d.* per ton additional freight for each market-day's detention thereafter.—The vessel came into collision with a steam-tug in the Thames, and was sunk with the cargo on board, but was got up, and on the afternoon of the 23rd of April arrived at a tier at Wapping, whither she was ordered by the harbour-master. Notice of her arrival was on the same day given to the agents of the freighter, and they were required to name a wharf; but they declined to do so. On the 24th the ship and freight were arrested by process out of the Admiralty Court in a suit instituted by the owners of the tug.—Upon a special case on which by agreement the Court were to draw inferences of fact:—*Held*, that the plaintiff was entitled to recover, as damages for the refusal to name a wharf, and so refusing to accept the cargo, the amount he would have received as freight if the cargo had been duly delivered, there having been a complete breach before the arrest; but that he was not entitled to demurrage. Stewart *v.* Rogerson [424

DEANERY—Preferment annexed to - 384
See Preferment annexed to Deanery.

DEED—Married woman—Acknowledgment 411
See Acknowledgment by Married Woman.

DEMAND AND REFUSAL—Conversion—Statute of Limitations - - - 206
See Limitations, Statute of.

DEMURRAGE—Measure of damage - 424
See Damages for Breach of Charter-party.

DEPUTY—Right to appoint—Sexton - 445
See Burial-ground.

DESCRIPTION OF OCCUPATION OF ATTESTING WITNESS - - - - 98
See Affidavit with Bill of Sale.

DESCRIPTION OF QUALIFICATION—County vote
See Vote for Parliament. 8. [281

DETINUE—Statute of Limitations - 206
See Limitations, Statute of.

DEVISE—Accruing share - - Ex. Ch. 532
See Accruing Share.

—— Repugnant provisions - - Ex. Ch. 500
See Repugnant Provisions in Will.

DIRECTORS—Authority—Amalgamation 54, Ex. Ch. 222
See Amalgamation of Companies.

DOCUMENTS—Inspection - - - 252
See Inspection of Documents.

DRAMATIC COPYRIGHT—Joint authorship 523
See Joint Authorship.

DWELLING-HOUSE—Borough vote - 327
See Vote for Parliament. 4.

ECCLESIASTICAL LAW—Deanery—Preferment annexed - - - - 384
See Preferment annexed to Deanery.

EELS—Fence-season - - - - 570
See Fence-Season for Fish.

ELECTION, PARLIAMENT—Petition—Report of judge - - - - 147
See Report of Election Judge.

—— Principal and agent—Contract **Ex. Ch.** 486
See Contract by Agent.

ELECTION JUDGE—Report - - 147
See Report of Election Judge.

ELECTION PETITION—Report of judge - 147
See Report of Election Judge.

ENGINE—Fire—Negligence - **Ex. Ch.** 14
See Evidence of Negligence.

ERROR—Assignment of error in fact - 376
See Assignment of Error.

ERROR IN FACT—Assignment - - 376
See Assignment of Error.

ESTOPPEL—Colonial judgment - - 228
See Lex Loci.

—— Company—Calls - **54, Ex. Ch.** 222
See Amalgamation of Companies.

—— Confession of plea - - **Ex. Ch.** 180
See Confession of Plea.

—— Election petition—Report of judge - 147
See Report of Election Judge.

EVIDENCE—Inspection of documents - 252
See Inspection of Documents.

—— Husband and wife—Necessaries - 38
See Necessaries for Wife.

—— Interrogation - - - - 36
See Interrogation, Materiality of.

EVIDENCE OF NEGLIGENCE—*Railway Company—Negligence—Fire Engine—Remoteness of Damage.*] Workmen employed by the defendants, a railway company, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there fourteen days during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps of trimmings and the hedge, and spread to a stubble-field beyond, and was thence carried by a high wind across the stubble-field and over a road, and burnt the plaintiff's cottage, which was situated about 200 yards from the place where the fire broke out. There was evidence that an engine belonging to the defendants had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine, nor was there any evidence that the fire began in the heaps of trimmings and not on the parched ground around them:—*Held*, first, that it being a matter of common knowledge that engines do

EVIDENCE OF NEGLIGENCE—*continued.*

emit sparks, there was evidence for the jury that the fire originated in sparks from the engine that had just passed.—Secondly, that there was evidence for the jury that the defendants were negligent in leaving the dry trimmings, and that the trimmings either originated or increased the fire, and caused it to spread to the stubble-field.—Thirdly, that if the defendants were negligent they were responsible for the injury that resulted from their conduct to the plaintiff, although they could not have reasonably anticipated that such injury would be caused by it. Smith *v.* The London and South Western Ry. Co. **Ex. Ch.** 14

EXCHEQUER CHAMBER—Appeal to—Costs 461
See Costs of Appeal to Exchequer Chamber.

EXCUSE FROM RATES—Borough vote - 365
See Vote for Parliament. 5.

EXECUTION—Authority to postpone - 440
See Authority to postpone Execution.

—— Company—Scire facias - - 576
See Scire Facias.

FAILURE OF CONSIDERATION—Apprenticeship - - - - - 78
See Contract for Personal Services.

FALSE IMPRISONMENT—Notice of action 474
See Notice of Action.

FENCE-SEASON FOR FISH—*Fishery—Fence-Season for Eels—Thames Conservancy Act*, 1864. (27 & 28 *Vict. c.* 113), *ss.* 65, 67—*Construction of Bye-Law.*] The 65th section of the Thames Conservancy Act, 1864 (27 & 28 Vict. c. 113), impowers the conservators to make bye-laws for, amongst other things, "determining the times during which the taking of any particular or specified kinds of fish shall not be practised."—One of the bye-laws made in pursuance of that authority was as follows:—"The following respective periods shall be deemed to be the fence-season in the upper river, that is to say,—(*a.*) For salmon, salmon-trout, and trout, the period between the 10th September in each year and the 31st March following, both inclusive,—(*b.*) For pike, jack, perch, roach, rudd, barbel, bream, chubb, carp, tench, grayling, gudgeon, pope, dace, crayfish, bleak, minnow, and every kind of fish known as river fish (except salmon, salmon-trout, and trout), the period between the 14th February in each year and the 31st May following, both inclusive:"—*Held*, that "eels" are included in the general words, "every kind of fish known as river fish," Woodhouse *v.* Etheridge [570

FIRE-ENGINE—Negligence - **Ex. Ch.** 14
See Evidence of Negligence.

"FISH KNOWN AS RIVER FISH" - 576
See Fence-Season for Fish.

FISHERY—Fence-season - - - 576
See Fence-Season for Fish.

FLAG—Hackney carriage - - - 29
See Hackney Carriage. 2.

FOREIGN ATTACHMENT—Mayor's Court 142
See Mayor's Court Jurisdiction.

FOREIGN JUDGMENT—Bankruptcy - 228
See Lex Loci.

FREEHOLD RENT-CHARGE—County vote 281
See Vote for Parliament. 8.

FREIGHT—Charterparty—Measure of damage [424
See Damages for Breach of Charterparty.

FRESH ADVANCE—Assignment—Bankruptcy [107
See Assignment of all Debtor's Property.

GENERAL ACT—Particular act—Construction
See Serjeants' Inn. [125

—— Particular act—Construction - - 384
See Preferment annexed to Deanery.

"GENERAL LINE OF BUILDINGS"—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75—*Certificate of Superintending Architect, Effect of.*] In a proceeding before a magistrate under the Metropolis Management Amendment Act, 1862, s. 75, for erecting a building without the consent of the Metropolitan Board of Works, beyond the general line of buildings in a street, the certificate of the superintending architect of such board is not absolutely conclusive, but the magistrate is entitled to judge for himself whether the line fixed by such certificate be in fact the general line of buildings in the street:—*St. George, Hanover Square* v. *Sparrow* (16 C. B. (N.S.) 209; 33 L. J. (M.C.) 118) followed.—*Bauman* v. *Vestry of St. Pancras* (Law Rep. 2 Q.B. 528) discussed. Simpson *v.* Smith - 87

GENERAL WORDS—Statute—Construction 384
See Preferment annexed to Deanery.

HACKNEY-CARRIAGE—*Railway Station*—*"Plying for Hire"*—*Metropolitan Public Carriage Act*, 1869 (32 & 33 *Vict. c.* 115), *s.* 4.] A brougham, the owner of which, by agreement with a railway company, attends at their station to await the arrival of trains for the conveyance of any passenger by the railway who chooses to hire it, and whose driver solicits passengers, is a "hackney-carriage plying for hire" within the meaning of s. 4 of the Metropolitan Public Carriage Act, 1869 (32 & 33 Vict. c. 115).—*Clarke* v. *Stanford* (Law Rep. 6 Q. B. 357) followed. Allen *v.* Tunbridge - - - - - - 481

2. —— *Rate of Charge*—*Flag*—*Licensing under* 32 & 33 *Vict. c.* 115—*Order of Secretary of State.*] The Metropolitan Public Carriage Act, 1869, empowers the home secretary to license hackney-carriages in such manner and in such form and subject to such conditions as he may by order prescribe; and also to make regulations for (amongst other things) fixing the rates of fares and for securing the due publication thereof.—In pursuance of the power thus conferred upon him, the home secretary made an order prescribing a form of licence, which was to contain the rate to be charged for the hire of each carriage per mile and per hour. The order further required that the application for a licence should specify the sums which the applicant desired to have inserted in the licence as the rates at which the carriage should ply for hire; that the carriage should be inspected prior to the licence being issued; and that, before plying for hire, the proprietor should affix to the top of the carriage a metal flag with

HACKNEY-CARRIAGE—*continued.*

the rates to be charged in accordance with his licence. Penalties were imposed by the Act for breach of the order.—Upon a summons against the proprietor of a hackney-carriage for non-compliance with the order in respect of the affixing a flag with the fares, the magistrate refused to convict the defendant, on the ground that the order was not a sufficient compliance with the Act; inasmuch as the secretary of state had no power to authorize an indefinite number of scales of charge for hackney-carriages, but only one scale binding upon all hirers and all proprietors:—The Court (Brett, J., doubting,) reversed his decision. Bocking *v.* Jones - - 29

HOP-GROUNDS—Tithes - - - 596
See Assignment of District for Tithes.

HOUSE OF LORDS—Appeal to—Costs - 461
See Costs of Appeal to Exchequer Chamber.

HUSBAND AND WIFE — Acknowledgment of deed by wife - - - 411
See Acknowledgment by Married Woman.

—— Error in fact—Assignment - - 376
See Assignment of Error.

—— Necessaries - - - - 28
See Necessaries for Wife.

"IMPROPER NAVIGATION"—*Shipping*—*Mutual Protection Association*—*Construction of Deed.*] An association of steam-ship owners agreed by deed to indemnify each other, in respect of ships entered by them in the association, against (amongst other things) "loss or damage which, by reason of the improper navigation of any such steam-ship as aforesaid, may be caused to any goods, &c., on board such steam-ship."—The plaintiffs' steam-ship *Severn* was duly entered, and whilst on a voyage from Memel to Hull with a cargo of linseed and flax, having encountered heavy weather, and being short of coals, she put back to Frederickshaven to coal, and to trim her cargo, which had shifted. Going into the harbour she took the ground, but was got off within an hour. The pumps were put on to try whether she had made any water, and for this purpose the bilge-cock was opened, but through the negligence of the crew this cock was not closed when the attempt to pump ceased. Whilst the *Severn* was moored at Frederickshaven quay, orders were given to put on the donkey-engine pumps to fill the boilers, and for this purpose the sea-cock was opened. The sea-cock communicated with the box or tank in which was the bilge-cock; and, when the boilers were filled, the sea-cock being through a like negligence left open, the water entered in large quantities by means of the open bilge-cock into the hold of the vessel, and damaged the linseed:—*Held*, that this was a damage arising from "improper navigation," within the meaning of the deed. Good *v.* London Steam-ship Owners' Mutual Protecting Association 563

INJUNCTION—Railway company—Undue preference - - - - 194, 554
See Railway and Canal Traffic Act, 1854.

INNKEEPER — *Liability for Loss of a Guest's Property—Contributory Negligence.*] The plaintiff, a traveller, went to an hotel at Bristol, arriving at 11 P.M. In the commercial room he took from his pocket a canvas bag containing 22*l.* in gold, some silver, and a 5*l.* note, and took out 6*d.* to pay for some stamps. He was then shewn to a bedroom on an upper storey, the door of which had a lock and a bolt, and the window of which looked out on to a balcony. He was cautioned by the chambermaid that the window was open, but nothing was said about locking the door. On going to bed he closed the door but did not lock or bolt it, and placed his clothes, the bag of money being in one of the pockets, on a chair at his bedside. During the night some one entered his room by the door while he slept, and stole the bag and money.—The judge (of a county court), in summing up the case to the jury, after explaining to them the law as to the liability of innkeepers for the safe custody of the property of their guests, told them that the question for their consideration was whether the loss would or would not have happened if the plaintiff had used the ordinary care that a prudent man might reasonably be expected to have taken under the circumstances. The jury found for the defendants:—*Held*, that the direction was right, and the verdict warranted by the evidence. Oppenheim *v.* White Lion Hotel Company - - - - 515

INSPECTION OF DOCUMENTS—*Practice*—14 & 15 *Vict. c.* 99, *s.* 6—*Privilege—Report made to Insurance Company by Medical Man as their Agent —Private Friends' Report.*] In an action against an insurance company upon a policy of life insurance, the defendants having pleaded that the policy was obtained by fraudulent concealment and misrepresentation of material facts, the plaintiffs applied for inspection of the following documents: viz., two reports made to the company by private friends of the assured, to whom the company were referred, with relation to the assured's state of health and habits; and a report made by a medical man to whom the assured was referred for examination on behalf of the company. At the head of the printed forms of questions, upon which these reports were made, were statements that the company would regard the answers given as strictly private and confidential. It appeared from the plaintiffs' affidavits that the company, on accepting the insurance, after consideration of the proposals for insurance, and of these reports, had charged a special rate of premium on the ground that the life was not a first-class one:—The Court allowed inspection of the documents, on the ground that they were not privileged from inspection, and the plaintiffs had made out a good primâ facie case for supposing that they were material to their case. Mahony *v.* National Widows' Life Assurance Fund - - - - - - 252

INSPECTORSHIP DEED—Liability of trustee 1
See Trustee under Inspectorship Deed.

INSURANCE COMPANY—Agents' report — Inspection - - .. - 252
See Inspection of Documents.

INSURANCE, MARINE—Improper navigation
See Improper Navigation. [563

—— Loss—Amount recoverable - - 616
See Average Loss.

INTERROGATORIES—Materiality - 36
See Interrogatories, Materiality of.

—— Not answering—Attachment - - 105
See Attachment for Contempt.

INTERROGATORIES, MATERIALITY OF—*Practice—Interrogatories under s.* 51 *of Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125).] A judge at chambers refused, before declaration, to allow the following interrogatory to be put to the secretary of a railway company, in an action for negligence:—"5. If you say that there was a collision, what was it that the train in which the plaintiff was a passenger came into collision with? Were the defendants possessed thereof? Was it under the care of themselves or any one or more of their servants? Was it on the same rails with the said train? Was it standing still or moving? If moving, was it moving towards H., or in the opposite direction? How came it to be on the rails there? If there was any other cause of the collision or other accident beyond what you have stated, what was it?" The Court refused a rule to vary his order. Bechervaise *v.* The Great Western Railway Company - - 36

JOINT AUTHORSHIP — *Dramatic Copyright — Alterations and Additions*—3 & 4 *Wm.* 4, *c.* 15.] One who employs another to write a play for him, and even suggests the subject, does not thereby become the proprietor of the copyright.—In order to constitute a joint authorship of a dramatic piece or other literary work, it must be the result of a preconcerted joint design. Mere alterations, additions, or improvements by another person, whether with or without the sanction of the author, will not entitle such other person to claim to be "joint author" of the work. The plaintiff, the lessee of a theatre, employed one W. to write a play for him, suggesting the subject. W. having completed it, the plaintiff and some members of his company introduced various alterations in the incidents and in the dialogue, to make the play more attractive, and one of them wrote an additional scene:—*Held*, that these circumstances did not make the plaintiff joint author of the play with W.— The play being finished, a sum of 4*l.* 15*s.* was paid to W. on account, and he signed a receipt, drawn up by the plaintiff's attorney, as follows:—"Received of Mr. L. (the plaintiff) the sum of 4*l.* 15*s.* [on] account of 15 guineas for my share, title, and interest as co-author with him in the drama intituled, &c.; balance of 15 guineas to be paid on assigning my share to him." The balance was never paid, nor was any assignment executed by W.:—*Held*, no evidence that the plaintiff was either "joint author" or assignee of the author. Levy *v.* Rutley - - - - - - 523

"JUDGMENT" - - - - - - 245
See Costs of Prohibition.

JUDGMENT—Trover—Effect on property - 584
See Judgment in Trover.

JUDGMENT, COLONIAL—Bankruptcy - 228
See Lex Loci.

JUDGMENT CREDITOR—Company—Scire facias
See Scire Facias. [576

JUDGMENT IN TROVER—*Tort-Feasors; Effect of Judgment in an Action against one—Detinue—*

JUDGMENT IN TROVER—*continued.*

Trover — Recovery, without Satisfaction — Judgment.] A judgment in an action against one of two joint tort-feasors is a bar to an action against the other for the same cause although such judgment be unsatisfied: so held upon the authority of *King* v. *Hoare* (13 M. & W. 494). A judgment against the defendant in trover without satisfaction does not vest the property in the goods in the defendant,—overruling the dictum of Jervis, C.J., in *Buckland* v. *Johnson* (15 C. B. 145; 23 L. J. (C.P.) 204). Brinsmead *v.* Harrison 584

JURISDICTION—Mayor's Court—Foreign attachment - - - - - 142
See Mayor's Court Jurisdiction.

—— Variation of order—Costs - - 259
See Agreement to Refer.

LANDLORD AND TENANT—Covenant to pay rates and taxes - - - 228
See Covenant to pay Taxes and Assessment.

LESSEE OR ASSIGNEE OF TERM—County vote
See Vote for Parliament. 6. [267

LEX LOCI—*Debtor and Creditor—Bankruptcy—Composition Deed — Colonial Courts — Estoppel.*] The English bankruptcy law is binding upon the colonies, and an English composition deed, containing a covenant not to sue, may be pleaded to an action on a Canadian debt in a Canadian court. —Therefore, in an action on a Canadian judgment, founded on a contract made and to be performed in Canada, the defendant cannot set up a composition deed made in England before the judgment in Canada. The English courts are bound by the provisions of the English bankruptcy law in actions on foreign and colonial as well as English debts.—Therefore, if a creditor in respect of a contract made and to be performed abroad sues in an English court, an English composition deed containing a covenant not to sue, is a good answer to the action. A covenant in a composition deed that the creditors will not sue for their debts, and that, if they do, the deed may be pleaded as an accord and satisfaction, and in bar of the suit or other proceeding, does not make the creditors who sue, and against whom the deed is set up, forfeit their debt or lose their right to their dividends, and does not render the deed void. Ellis *v.* M'Henry. Ellis and Another *v.* M'Henry - 228

LIABILITY OF INNKEEPER—Loss of goods
See Innkeeper. [515

LICENCE—Hackney-carriage - - 29
See Hackney-Carriage.

LIMITATIONS, STATUTE OF—21 *Jac.* 1, *c.* 16—*Detinue—Bailment — Conversion — Demand and Refusal.*] Goods having been bailed by the plaintiffs to the defendant for safe custody, the defendant wrongfully sold them; and the plaintiffs, more than six years after the date of the sale, being ignorant of the fact of its having taken place, demanded the return of the goods, which the defendant refused:—*Held*, in an action of detinue for the goods, that the Statute of Limitations ran from the date of the demand and refusal, and not from that of the sale, inasmuch as the plaintiffs, in such a case, though entitled if they had discovered the sale to sue immediately

LIMITATIONS, STATUTE OF—*continued.*

for a conversion of the goods, were also entitled to elect to sue upon the breach of the bailee's duty in the ordinary course by the refusal to deliver up on request.—*Semble*, where an action of detinue is founded upon a bare taking and withholding of the property of another without any circumstances to shew a trust for the owner, or to found an option to sue either for the wrong or for the breach of the original terms of deposit, the statute would run from the time at which the property was first wrongfully dealt with. Wilkinson and Another *v.* Verity - - - - - 206

LIQUIDATION BY ARRANGEMENT—Rotation [107
See Assignment of all Debtor's Property.

LIST OF £12 OCCUPIERS—County vote - 272
See Vote for Parliament. 7.

LOCAL BOARD—Recovery of paving expenses—Cumulative remedy - - 247
See Recovery of Paving Expenses.

LOCOMOTIVE—Fire—Negligence - Ex. Ch. 14
See Evidence of Negligence.

LODGER—Borough vote - - 309, 312
See Vote for Parliament. 1, 2.

LORD MAYOR'S COURT—Jurisdiction - 142
See Mayor's Court Jurisdiction.

LOST BILL, ACTION ON—Costs - - 466
See Costs of Action on Lost Bill.

MARINE INSURANCE—Improper navigation
See Average Loss. [563

—— Loss—Amount recoverable - - 616
See Average Loss.

MARKET-GARDEN—Tithes - - 596
See Assignment of District for Tithes.

MARRIED WOMAN—Deed—Acknowledgment [411
See Acknowledgment of Married Woman.

MASTER AND SERVANT—Negligence - 24
See Negligence of Servant.

MAYOR'S COURT JURISDICTION—*Foreign Attachment—Bill of Exchange payable in London.*] Bills of Exchange were drawn and accepted abroad, and indorsed by the defendant abroad, one of them being payable in London, the others in Liverpool. The plaintiffs, foreign bankers, having no residence or place of business in London, as indorsees of the bills, sued the defendant (who likewise had no residence or place of business in London) in the Mayor's Court, and attached moneys of the defendant in the hands of the garnishee, a banker in London:—The Court made absolute a rule for a prohibition; holding, upon the authority of *Mayor of London* v. *Cox* (Law Rep. 2 H. L. 239), that the Mayor's Court had no jurisdiction, the cause of action not arising within the city, and the parties to the suit being both resident abroad. Banque de Credit Commercial *v.* De Gas Lazard, Garnishee - - 142

MEASURE OF DAMAGE—Charterparty - 424
See Damages for Breach of Charterparty.

METROPOLIS LOCAL MANAGEMENT ACTS 217
See Recovery of Paving Expenses.

METROPOLIS MANAGEMENT ACT, 1862 - 87
See GENERAL LINE OF BUILDING.

MISNOMER –List of 12*l.* occupiers—County vote
See VOTE FOR PARLIAMENT. [272

MISTAKE OF PART-PAYMENT - - 405
See PAYMENT OVER BY AGENT.

MODUS—Tithes—Conversion of land into tillage
See TILLAGE. [470

MORTGAGE—County vote - - - 292
See VOTE FOR PARLIAMENT.

MUTUAL CREDIT—Debt of agent - - 610
See SET-OFF OF DEBT OF AGENT.

NECESSARIES—Wife - - - 38
See NECESSARIES FOR WIFE.

NECESSARIES FOR WIFE—*Husband and Wife —Authority of Wife to pledge Husband's Credit— Articles of Luxury—Evidence for a Jury.*] A wife has implied authority to pledge her husband's credit for such things only as fall within the domestic department ordinarily confided to the wife's management, and are necessary and suitable to the style in which her husband chooses to live; or for goods, if she carries on a separate trade with the concurrence of her husband, suitable for such trade.—It is not enough, where the burthen of proof lies on the plaintiff, for him to prove facts which are equally consistent with the negative as with the affirmative of the proposition which he has to establish. PHILLIPSON *v.* HAYTER - 38

NEGLIGENCE—Innkeeper—Loss of goods 515
See INNKEEPER.

—— Interrogatories - - - - 36
See INTERROGATORIES, MATERIALITY OF.

—— Master and servant - - - 24
See NEGLIGENCE OF SERVANT.

—— Fire from engine - - Ex. Ch. 14
See EVIDENCE OF NEGLIGENCE.

—— Railway company—Passenger's luggage 44
See PASSENGER'S LUGGAGE.

NEGLIGENCE OF SERVANT—*Master and Servant —Test of Liability of Master.*] The defendant employed a stevedore to unload his vessel. The stevedore employed his own labourers, amongst whom was the plaintiff, and also one of the defendant's crew, named Davis, whom he paid and over whom he had entire control, to assist them, in unloading. The plaintiff, whilst engaged in the work, was injured through the negligence of Davis:—*Held* that the defendant was not responsible for the injury. MURRAY *v.* CURRIE - 24

NEXT PRACTICABLE SESSIONS - - 414
See APPEAL TO QUARTER SESSIONS.

NOTICE OF ACTION—*False Imprisonment—Act done in pursuance of Statute—Bonâ fide Belief— Reasonableness of—Larceny Act* (24 & 25 *Vict. c.* 96), *ss.* 103, 113.] A defendant in an action for false imprisonment is entitled to notice of action under the Larceny Act, s. 113, if he honestly believed in the existence of a state of things which, if it had existed, would have justified his doing the acts complained of under the statute. Some facts, therefore, must exist, such as might give rise to an honest belief; but it is not necessary that the belief should be reasonable.—*Leete* v. *Hart* (Law Rep. 3 C.P. 322) explained. CHAMBERLAIN *v.* KING - - - - - - 474

NOTICE OF ALLOTMENT—Shares - - 591
See ALLOTMENT OF SHARES.

NOTICE OF APPEAL—Quarter Sessions - 414
See APPEAL TO QUARTER SESSIONS.

OCCUPATION OF ATTESTING WITNESS - 98
See AFFIDAVIT WITH BILL OF SALE.

OCCUPIER—Liability for paving expenses 247
See RECOVERY OF PAVING EXPENSES.

ORDER OF SECRETARY OF STATE—Hackney carriage - - - - 29
See HACKNEY CARRIAGE.

OWNER—Liability for paving expenses - 247
See RECOVERY OF PAVING EXPENSES.

PARLIAMENT — Election — Petition — Report of judge - - - - 147
See REPORT OF ELECTION JUDGE.

PAROL EVIDENCE—Written contract by agent
See CONTRACT BY AGENT [Ex. Ch. 486

PART OF HOUSE—Borough vote - 315, 327
See VOTE FOR PARLIAMENT. 3, 4.

PARTICULAR ACT—General Act—Construction
See SERJEANTS' INN. [125

—— General Act—Construction - - 384
See PREFERMENT ANNEXED TO DEANERY.

PARTNER—Authority—Banking account - 433
See PARTNER'S AUTHORITY.

PARTNER'S AUTHORITY — *Banking Account opened by one Partner on behalf of Firm in his own Name—Ordinary Scope of Partnership Business.*] There is no implication of law from the mere existence of a trade partnership that one partner has authority to bind the firm by opening a banking account on its behalf in his own name. THE ALLIANCE BANK, LIMITED *v.* KEARSLEY. - 433

PASSENGER—Railway company—Luggage 44
See PASSENGER'S LUGGAGE.

PASSENGER'S LUGGAGE—*Railway Company— Common Carriers—Negligence.*] When a passenger's luggage is at his request placed by a railway company's servants in the carriage in which he is travelling, the company's contract to carry it safely is subject to an implied condition that the passenger takes ordinary care of it, and if his negligence causes its loss the company are not responsible.—A passenger whose portmanteau had been placed at his request in the carriage with him got out at an intermediate station on his journey, and having negligently failed to find the same carriage again, finished his journey in a different one; the portmanteau having been robbed during the latter part of the journey by persons in the carriage without any negligence of the railway company:—*Held*, that the railway company was not responsible for the loss. TALLEY *v.* GREAT WESTERN RAILWAY COMPANY - - 44

PAVING EXPENSES, RECOVERY OF — Cumulative remedy - - - 247
See RECOVERY OF PAVING EXPENSES.

PAYMENT—Agent—Settlement in account 405
See PAYMENT OVER BY AGENT.

—— Principal and interest—County vote - 292
See VOTE FOR PARLIAMENT. 9.

PAYMENT OF RATE—Borough vote - 365
See Vote for Parliament. 5.

PAYMENT OVER BY AGENT—*Money paid in Mistake—Settlement in Account.*] A. bought cotton of B., both being cotton-brokers at Liverpool, and each acting for an undisclosed principal. Weight-lists of the cotton were in the usual course delivered to each party from the warehouse-keeper at the dock; but by a mistake made by a clerk of B. in adding up the figures, the quantity appeared to be 100 cwt. more than it really was, and A., in ignorance of the mistake, paid B. 509*l.* 15*s.* too much. The mistake was not discovered by either party until several months afterwards. In the meantime, B. had allowed the money so received by him to be settled in account between himself and his principals, to whom he had made advances; and at the close of the transactions between them there was a large balance owing by his principals to B.:—*Held*, that A. was entitled to recover back from B. the sum so overpaid to him, the case not falling within the rule by which an agent is relieved from responsibility where he has bonâ fide paid over moneys received by him on account of his principals. Newall *v.* Tomlinson - 405

PLEADING—Confession of plea - Ex. Ch. 180
See Confession of Plea.

"PLYING FOR HIRE" - - - 481
See Hackney-Carriage.

POOR—Rating—Serjeants' Inn - - 125
See Serjeants' Inn.

POOR-RATE—Appeal—Next practicable sessions
See Next practicable Sessions. [414

POOR-RATE ASSESSMENT AND COLLECTION ACT, 1869 - - - - 315
See Vote for Parliament. 3.

PRACTICE (COMMON LAW)—Action on lost bill—Costs - - - - 466
See Costs of Action on Lost Bill.

—— Agreement to refer—Costs - - 259
See Agreement to Refer.

—— Arbitration—Revocation of submission 212
See Revocation of Submission.

—— Change of venue - - - 116
See Change of Venue.

—— Confession of plea - - - 180
See Confession of Plea.

—— Costs—Appeal - - - - 461
See Costs of Appeal to Exchequer Chamber.

—— County Court appeal - - - 484
See County Court Appeal.

—— Error in fact—Assignment - - 376
See Assignment of Error.

—— Inspection of documents - - 252
See Inspection of Documents.

—— Interrogation—Attachment - - 105
See Attachment for Contempt.

—— Interrogatories - - - - 36
See Interrogatories, Materiality of.

—— Prohibition—Costs - - - 245
See Costs of Prohibition.

PREFERMENT ANNEXED TO DEANERY—*Ecclesiastical Law — Construction of Statute — General Words—4 & 5 Anne, c. xxxii.—3 & 4 Vict. c. 113, s. 50—13 & 14 Vict. c. 94, s. 19.*] By a private Act of 4 & 5 Anne, intituled "An Act for augmenting the number of canons residentiary in the cathedral church of Lichfield, and for improving the deanery and prebends of the said cathedral," reciting, amongst other things, "that Her Majesty, in consideration of the small income that arose to the dean out of the revenue of the said church, and the great charge he must necessarily undergo in the decent attendance upon his place and office, had been graciously pleased to permit that the rectory of Tatenhill, the perpetual advowson whereof Her Majesty was seised of in right of the Duchy of Lancaster, should be annexed to the said deanery," it was enacted "that the said rectory and church of Tatenhill should be united and annexed to the deanery of Lichfield for ever, and the dean of Lichfield then in being, upon application made to the bishop of Lichfield, should receive institution to the same without presentation, and continue possessed thereof in right of his deanery, so long as he should remain dean of Lichfield, and no longer; it being the intent of that Act that the dean of Lichfield and his successors for ever should always be rectors and incumbents of that church, on making such allowance to a curate or curates as the bishop should appoint," &c.—By s. 50 of 3 & 4 Vict. c. 113, intituled "An Act to carry into effect, with certain modifications, the Fourth Report of the commissioners of ecclesiastical duties and revenues," it is enacted that, "subject to the provisions herein contained, all the estate and interest which the holder of any deanery or canonry not suspended by or under the provisions of this Act, and his successors, have and would have in any lands, tithes, and other hereditaments or endowments whatsoever annexed or belonging to or usually held or enjoyed with such deanery or canonry (except any right of patronage), or whereof the rents and profits have been usually taken and enjoyed by the holder of such deanery or canonry as such holder separately and in addition to his share of the corporate revenues of such chapter, shall, without any conveyance or assurance in the law other than the provisions of this Act, accrue to and be vested absolutely in the ecclesiastical commissioners for England, and their successors, for the purposes of this Act"—*Held*, that the general provision in s. 50 of the 3 & 4 Vict. c. 113, did not repeal the particular provision in the 4 & 5 Anne, c. xxxii., for annexing the rectory of Tatenhill to the deanery of Lichfield, so as to re-vest the patronage of the rectory in the Crown, and vest the emoluments thereof in the ecclesiastical commissioners for the purposes of the Act.—The 13 & 14 Vict. c. 94, s. 19, enacts that "no spiritual person appointed to the deanery of any cathedral or collegiate church shall accept to take and hold therewith any benefice not situate within the city or town of the cathedral or collegiate church in which he shall hold such deanery:"—*Held*, that the dean of Lichfield did not accept the rectory of Tatenhill to hold the same with the deanery, within the meaning of that statute; but that, on his appointment to the deanery, he became rector of Tatenhill by force of the statute of Anne. The Queen *v.* Champneys - - - - - - 384

PREMIUM—Apprenticeship—Death of master [78
See Contract for Personal Services.
PRINCIPAL AND INTEREST—Payment—County vote - - - - - 292
See Vote for Parliament. 9.
PRIVILEGED COMMUNICATION—Inspection 252
See Inspection of Documents.
PROHIBITION—Costs - - - 245
See Costs of Prohibition.
—— Mayor's Court - - - - 142
See Mayor's Court Jurisdiction.
—— Quarter sessions—Appeal - - 414
See Appeal to Quarter Sessions.

QUARTER SESSIONS—Appeal—Notice - 414
See Appeal to Quarter Sessions.

RAILWAY AND CANAL TRAFFIC ACT, 1854—*Railway Company—Injunction*—17 & 18 *Vict. c.* 31, *s.* 2—*Undue Preference.*] A railway company, with a view to compete with other carriers in the collection and carriage of goods, established receiving-offices in various parts of London, from which goods were brought in vans to the railway station. The gates of the station were closed against the vans of the complainant and other carriers at 6.30 P.M., but the company's own vans were admitted at a much later hour, and the goods brought by them were forwarded by the same night's trains:—*Held*, that this was giving an undue and unreasonable preference to the company's own traffic, to the prejudice of the complainant; and a rule for an injunction under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), s. 2, was made absolute, with costs.—*Quære*, whether a course of business necessary for securing an advantage to the public, which at the same time gave a monopoly to the company, would be an undue or unreasonable prejudice to other carriers.—*Re Palmer and London and South Western Ry. Co.* (Law Rep. 1 C. P. 588) observed upon. *In re* Palmer and The London, Brighton, and South Coast Railway Company - 194

2. —— (17 & 18 *Vict. c.* 31)—*Undue Preference and undue Prejudice.*] The Great Western Railway Company had an office at Cirencester for the reception of goods to be carried by them on their railway, and an agent there to whom goods arriving at the station addressed to persons residing in Cirencester were intrusted for delivery on account and for the profit of the company. The complainant, a common carrier at Cirencester, complained that the company refused to recognize or act upon general orders signed by the consignees of goods, directing the company to hand over to him (the complainant) for delivery all goods which might arrive at the Cirencester station addressed to such consignees; but that they required him (the complainant) to produce on each occasion a special order describing the particular goods which the consignees desired to have delivered to them by him; no such special (or any) orders being required from their own agent:—*Held*, that this was ground for an injunction under the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), s. 2, it being an undue and unreasonable prejudice to the complainant in the conduct of his business of a carrier, and an undue preference and advantage to the company themselves. *In re* John Graham Parkinson and The Great Western Railway Company - - 554

RAILWAY COMPANY—Fire from engine [Ex. Ch. 14
See Evidence of Negligence.
—— Negligence—Interrogatories - - 36
See Interrogatories, Materiality of.
—— Passengers' luggage - - - 44
See Passengers' Luggage.
—— Scire facias - - - - 576
See Scire facias.
—— Undue preference - - - 194, 554
See Railway and Canal Traffic Act, 1854.

RAILWAY STATION—Hackney carriage 481
See Hackney-Carriage. 1.
RATING—Borough vote - - - 365
See Vote for Parliament. 5.
—— Part of house - - - - 315
See Vote for Parliament. 3.
—— Statute—Construction—Serjeants' Inn 125
See Serjeants' Inn.
RECEIPT—Bill of sale—Registration - 144
See Registration of Bill of Sale.
RECOVERY OF PAVING EXPENSES—*Metropolis Local Management Acts* (18 & 19 *Vict. c.* 120; 25 & 26 *Vict. c.* 102, *ss.* 77 *and* 96)—*Proportion of Paving Expenses—Action against Occupier after Judgment recovered against Owner—Cumulative Remedies—Res Judicata.*] The 77th and 96th sections of the Metropolis Local Management Amendment Act, 1862, make certain paving expenses recoverable by the vestry by action from the present or any future owner of premises, or from any person who then or thereafter occupies the premises.—The vestry had recovered a judgment against a former owner of certain premises in respect of such expenses, which remained unsatisfied:—*Held*, that such judgment was no bar to a subsequent action for the same expenses against the defendant, who occupied the premises as tenant to a succeeding owner. Vestry of Bermondsey *v.* Ramsey - - - 247
RECOVERY WITHOUT SATISFACTION—Trover
See Judgment in Trover. [584
REGISTRATION—Bill of sale - - 144
See Registration of Bill of Sale.
REGISTRATION OF BILL OF SALE—17 & 18 *Vict. c.* 36—*Receipt for the Price of Goods—Past Debt.*] Upon the trial of an interpleader issue, the plaintiff, the claimant, to prove a sale of the goods to him, put in a (stamped) receipt, as follows:—"Received of Mr. J. B. the sum of ninety pounds, being the amount agreed to be paid for the purchase of household furniture and effects on the premises, No. 94, &c., of which I have this day taken possession. G. E. B."—No money passed at the time; but the consideration for the giving of the receipt was a past debt; and the goods remained in the debtor's possession:—*Held*, that the instrument did not require registration under the Bills of Sale Act (17 & 18 Vict. c. 36). Byerley *v.* Prevost 144

REGULÆ GENERALES, T. T., 1853—Rules 22, 23 [Ex. Ch. 180
See Confession of Plea.

RELATION—Liquidation by arrangement 107
See Assignment of all Debtor's Property.

RELEASE—Condition - - Ex. Ch. 180
See Confession of Plea.

RENT-CHARGE—Chattel—County vote - 267
See Vote for Parliament. 6.

—— Freehold—County vote - - 281
See Vote for Parliament. 8.

REPAIRS, EXPENSE OF—Ship—Insurance 616
See Average Loss.

REPORT OF ELECTION JUDGE—*Parliament—Election Petition—Estoppel.*] A. was a candidate at an election at which B. was returned. A. having petitioned against his return and claimed the seat, recriminatory charges were made. At the trial of the petition B. was proved guilty of corrupt practices by his agents, and decided by the judge not to have been duly elected, and after some of the matters contained in the recriminatory charges were gone into and not proved, B. withdrew the charge by permission of the judge, and A. then abandoned his claim to the seat, and the judge certified to the House of Commons that B. was not duly elected, and reported, amongst other things, that he believed the election on the part of A. to have been perfectly pure. At the election which ensued A. was returned, and a petition was presented against his return alleging that he had been guilty of corrupt practices by himself and his agents at the previous election at which B. had been returned, the matters intended to be relied on having been discovered since the former trial.—On a rule to strike out these allegations from the petition on the ground that the matters alleged might have been given in evidence in support of the recriminatory charges at the previous trial:—*Held*, that the report of the judge at an election trial is not final and conclusive like his certificate as to the matters contained in it, and that the present petitioner was entitled to give evidence of the alleged corrupt practices. Stevens *v.* Tillett. Norwich Election Petition - - - - - - 147

REPUGNANT PROVISIONS IN WILL—*Devise, Construction of—Life Estate—Remainder in Fee.*] Testator devised as follows:—"I devise and bequeath to my dear mother, Mary, the wife of R. G., all my real and personal estate, &c.; and, knowing that what I give, devise, and bequeath to my said mother will become the property of her husband, my kind step-father, R. G., I therefore declare the intention of this my will to be, that the said R. G., being my dear mother's husband, and a kind step-father to me, shall hold and enjoy all my said real and personal estate and property of every sort and kind, to him, his heirs, &c., for ever, to be absolutely at his free will and disposal; provided that he does not at any time dispose of any portion of my said property to any or either of my late father T. G.'s family, who have lately treated me so unkindly:"—*Held*, by the Court of Common Pleas, that the mother took an estate for life in the realty, and R. G., the step-father, a remainder in fee.—*Held*, by the

REPUGNANT PROVISIONS IN WILL—*cont.*

Exchequer Chamber, that, whatever was the nature of the interest taken by the mother, R. G. took an estate in fee. Gravenor *v.* Watkins [Ex Ch. 500

RES JUDICATA—Cumulative remedies - 247
See Recovery of Paving Expenses.

RESIDENCE—Borough vote - 312, 309
See Vote for Parliament.

RETURN OF PREMIUM—Apprenticeship 78
See Contract for Personal Services.

REVOCATION OF SUBMISSION—*Arbitration*—9 & 10 *Wm.* 3, *c.* 15—3 & 4 *Wm.* 4, *c.* 42, *s.* 39—17 & 18 *Vict. c.* 125, *ss.* 7, 17.] An arbitration clause in a mercantile contract made no provision for making the submission a rule of court. A dispute arising out of the contract having been referred, one of the parties, professing to act under s. 17 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), made the submission a rule of court. No action was pending:—*Held* (Bovill, C.J., dissenting), that the submission, not being within either 9 & 10 Wm. 3, c. 15, nor 3 & 4 Wm. 4, c. 42, s. 39, there was nothing in ss. 7 or 17 of the Common Law Procedure Act, 1854, to authorize the Court to grant leave to revoke, but that it was competent to either party to revoke without such leave. *Re* Rouse and Meier 212

SALE—Conditions of - - - - 120
See Conditions of Sale.

SATISFACTION, RECOVERY WITHOUT—Trover
See Judgment in Trover [584

SCIRE FACIAS—*Company—Sci. fa. under* 8 & 9 *Vict. c.* 16, *s.* 36—*Judgment Creditor—Discretion of the Court—Act of Parliament obtained by Fraud.*] The discretion of the Court in granting or refusing a sci. fa. against a shareholder under s. 36 of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), is to be a judicial discretion exercised according to the known rules of law. A vague suggestion of fraud, or that parliament was imposed upon by false recitals in the special Act, will not, where a fair primâ facie case is made out by the plaintiff, induce the Court to withhold the writ; but the party will be left to plead to the sci. fa. any defence, legal or equitable, which he may have. Lee *v.* Bude and Torrington Junction Railway Company. *Ex parte* Stevens. *Ex parte* Fisher - 576

SEALING—Deed - - - - 411
See Acknowledgment by Married Woman.

SECRETARY OF STATE'S ORDER—Hackney carriage - - - - 29
See Hackney Carriage.

SEPARATE RATING—Part of house - 315
See Vote for Parliament.

SERJEANTS' INN—*Statute, Construction of—Effect of subsequent general upon prior particular Legislation—Rateability of Serjeants' Inn—*3 & 4 *Wm.* 4. *c.* cx.—*Representation of the People Act*, 1867, 30 & 31 *Vict. c.* 102, *s.* 7—*Poor Law Amendment Act*, 1868, 31 & 32 *Vict. c.* 122, *s.* 27.] The general principle to be applied to the construction of Acts of Parliament is, that a *general* Act is not to be construed to repeal a previous

SERJEANTS' INN—*continued.*

particular Act, unless there is some express reference to the previous legislation on the subject, or unless the two Acts are necessarily inconsistent. —Disputes having arisen between Serjeants' Inn and the parish of St. Dunstan as to whether or not the Inn was part of that parish and liable to the parochial burthens there, it was agreed, under the sanction of a private Act of Parliament (3 & 4 Wm. 4, c. cx.), that the Inn should pay the parish 80*l.* a year, and that the parish should accept that sum as "a full satisfaction and discharge of all poor-rates from time to time due or claimed to be due in respect of the said Inn:"—*Held*, that this special bargain was not repealed or affected by s. 7 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), or s. 27 of the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), or by any of the intermediate general Acts for the regulation of parishes or the assessment or collection of poor-rates therein. THORPE *v.* ADAMS. 125

SET-OFF—Debt of agent - - - 610
See SET-OFF OF DEBT OF AGENT.

SET-OFF OF DEBT OF AGENT—*Principal and Agent—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 31, 39.] To an action for damages for not accepting goods "to arrive," the defendant pleaded, by way of equitable defence, that the contract was made with one H., who was the agent of and intrusted by the plaintiff with the possession, &c., of the goods, as apparent owner thereof; that H., with the consent of the plaintiff, contracted in his own name, and that the defendant believed him to be the owner, and did not know that the plaintiff was the owner of or interested in the goods, or that H. was an agent; that H. was afterwards adjudicated a bankrupt; that, before the bankruptcy, mutual credit had been given by the defendant and H. in respect of the sale of the goods under the contract and in respect of money payable by H. to the defendant upon accounts stated, &c., before the bankruptcy and before the defendant had notice that H. was acting as agent, claiming a set-off:—*Held*, a bad plea,—the action being for unliquidated damages, and the set-off not within the rule in *George* v. *Clagett* (7 T. R 359). TURNER *v.* THOMAS - - - - 610

SETTLEMENT IN ACCOUNT—Agent - 405
See PAYMENT OVER BY AGENT.

SEXTON—Rights of—Burial-ground - 445
See BURIAL-GROUND.

SHAREHOLDER—Shares—Allotment - 591
See ALLOTMENT OF SHARES.

SHARES—Allotment - - - 591
See ALLOTMENT OF SHARES.

SHIP—Charterparty—Measure of damage 424
See DAMAGE FOR BREACH OF CHARTER-PARTY.

—— Insurance—Amount recoverable - 616
See AVERAGE LOSS.

—— Insurance—Improper navigation - 563
See IMPROPER NAVIGATION.

SOLICITOR—Authority—Execution - 440
See AUTHORITY TO POSTPONE EXECUTION.

SPECIFIC DEVISE—Accruing share Ex. Ch. 532
See ACCRUING SHARE.

STATUTE—Construction - - - 125
See SERJEANTS' INN.

—— Construction—General words - - 384
See PREFERMENT ANNEXED TO DEANERY.

STATUTES:—

8 Hen. 6, c. 7 - - - - 292
See VOTE FOR PARLIAMENT. 9.

1 Jac. 1, c. 16 - - - - 206
See LIMITATIONS, STATUTE OF.

9 & 10 Wm. 3, c. 15 - - - 212
See REVOCATION OF SUBMISSION.

4 & 5 Anne, c. xxxii. - - - 384
See PREFERMENT ANNEXED TO DEANERY.

28 Geo. 3, c. 36, s. 6 - - - 292
See VOTE FOR PARLIAMENT. 9.

54 Geo. 3, c. 170, s. 11 - - - 365
See VOTE FOR PARLIAMENT. 5.

1 Wm. 4, c. 21, s. 1 - - - 245
See COSTS OF PROHIBITION.

2 Wm. 4, c. 45, s. 27 - - - 327
See VOTE FOR PARLIAMENT. 4.

3 & 4 Wm. 4, c. 15 - - - 523
See JOINT AUTHORSHIP.

—— c. 42, s. 39 - - - - 212
See REVOCATION OF SUBMISSION.

—— c. 74 - - - - - 411
See ACKNOWLEDGMENT BY MARRIED WOMAN.

—— c. cx. - - - - 125
See SERJEANTS' INN.

6 & 7 Wm. 4, c. 71. ss. 40, 42 - - 496
See ASSIGNMENT OF DISTRICT FOR TITHES.

3 & 4 Vict. c. 113, s. 50 - - - 384
See PREFERMENT ANNEXED TO DEANERY.

6 Vict. c. 18, s. 40 - - - 281
See VOTE FOR PARLIAMENT. 8.

—— —— ss. 40, 101 - - - 272
See VOTE FOR PARLIAMENT. 7.

—— —— s. 74 - - - - 292
See VOTE FOR PARLIAMENT. 9.

8 & 9 Vict, c. 16, s. 36 - - - 576
See SCIRE FACIAS.

13 & 14 Vict. c. 94, s. 19 - - - 384
See PREFERMENT ANNEXED TO DEANERY.

14 & 15 Vict. c. 99, s. 6 - - - 252
See INSPECTION OF DOCUMENTS.

15 & 16 Vict. c. 85, s. 32 - - - 445
See BURIAL-GROUND.

17 & 18 Vict. c. 31, s. 2 - - 194, 534
See RAILWAY AND CANAL TRAFFIC ACT, 1854.

—— c. 36 - - - - - 144
See REGISTRATION OF BILL OF SALE.

—— —— s. 1 - - - - 95
See AFFIDAVIT WITH BILL OF SALE.

—— c. 125, ss. 7, 17 - - - 212
See REVOCATION OF SUBMISSION.

—— —— s. 11 - - - - 259
See AGREEMENT TO REFER.

—— —— s. 15 - - - - 31
See INTERROGATION, MATERIALITY OF.

—— —— s. 87 - - - - 466
See COSTS OF ACTION ON LOST BILL.

STATUTES—*continued.*
18 & 19 Vict. c. 120 - - - 247
See Recovery of Paving Expenses.
23 & 24 Vict. c. 93, s. 42 - - 596
See Assignment of District for Tithes.
24 & 25 Vict. c. 96. ss. 103, 113 - 474
See Notice of Action.
—— c. 134, s. 192 - - - 1
See Trustee under Inspectorship Deed.
25 & 26 Vict. c. 89, s. 161 54, Ex. Ch. 222
See Amalgamation of Companies.
—— c. 102, ss. 77, 96 - - - 247
See Recovery of Paving Expenses.
—— —— s. 75 - - - - 87
See General Line of Buildings.
27 & 28 Vict. c. 113, ss. 65, 67 - - 570
See Fence-season for Fish.
27 & 28 Vict. c. 30 - - - 414
See Appeal to Quarter Sessions.
30 & 31 Vict. c. 102, s. 3, subs. 4 - 365
See Vote for Parliament. 5.
—— —— ss. 3, 61 - - - 327
See Vote for Parliament.
—— —— s. 4, subs. 3 - - - 309
See Vote for Parliament. 1.
—— —— s. 4 - - - - 312
See Vote for Parliament. 2.
—— —— s. 7 - - - - 125
See Serjeants' Inn.
—— —— s. 30 - - - - 272
See Vote for Parliament. 7.
—— —— s. 61 - - - - 315
See Vote for Parliament. 3.
31 & 32 Vict. c. 58, s. 19 - - - 272
See Vote for Parliament. 7.
—— c.123, s. 27 - - - - 125
See Serjeants' Inn.
32 & 33 Vict. c. 41, s. 19 - - - 315
See Vote for Parliament. 3.
—— c. 71, ss. 31, 39 - . - 610
See Set-off of Debt of Agent.
—— —— s. 125 - - - - 107
See Assignment of all Debtor's Property.
—— c. 115 - - - - 29
See Hackney-Carriage.
—— —— s. 4 - - - - 481
See Hackney-Carriage.
STAY OF PROCEEDINGS—Agreement to refer 259
See Agreement to Refer.
SUBMISSION—Arbitration—Revocation - 212
See Revocation of Submission.

"TAXES AND ASSESSMENTS" - - 228
See Covenant to pay Taxes and Assessments.

TILLAGE—*Tithes—Modus, Breach of—Conversion of Land into "Tillage," what amounts to—Garden and Orchard Accessories to a House.*] An award made under a private inclosure Act commuting the tithes of a parish, set out the terms of a modus, preserved by the Act, by which certain lands in the parish were exempted from the payment of tithes in kind. By the terms of the modus, as set out, the exemption ceased during such time as the lands or any part thereof might be converted into tillage. A field of about an acre, which was among the lands subject to the modus, was dealt with as follows: A house was built upon a portion of it, and a further portion, to the extent of twenty-two perches, was at the same time converted into a garden by the then owner, who fenced off the house and garden from the rest of the field, the remaining portion being used as an orchard:—*Held*, that the manner in which the field had been dealt with, did not amount to a conversion of it, or any part of it, into "tillage." Vigar *v.* Dudman - - 470

TITHES—Assignment of district - - 596
See Assignment of District for Tithes.
—— Conversion of land into tillage - 470
See Tillage.
TITHE RENT-CHARGE - - - 228
See Covenant to pay Taxes and Assessments.
TOTAL LOSS—Amount recoverable - - 616
See Average Loss.
TRAFFIC—Railway company—Undue preference [194, 554
See Railway and Canal Traffic Act, 1854.
TROVER—Judgment—Effect on property - 584
See Judgment in Trover.

TRUSTEE UNDER INSPECTORSHIP DEED—*Bankrupt—Deed of Inspectorship and Composition under the Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134)—*Liability of Trustees.*] By a deed of composition under the Bankruptcy Act, 1861, the debtor assigned all his lands, goods, &c., to trustees, and covenanted that he would carry on or wind up his business under their superintendence and control, and that all moneys, &c., accruing in respect of the business should be deposited in a bank, and that he would act under the direction of the trustees in relation to the carrying on or winding up of the business. The trustees were impowered to employ any other person to effect the purposes of the deed, and to draw and accept bills, &c., for carrying on the business, and to make advances; and it was provided that all moneys received by the trustees should be applied, first, in payment of the costs of the deed, next, of debts incurred in carrying on the business and of their advances, and, lastly, in payment to the debtor of such sums as the trustees should think fit to allow him as a remuneration for his trouble; the surplus to be held in trust for the debtor. Then came a proviso that the trustees were to be answerable each for his own acts or defaults only, and a declaration that, if the instalments of the composition should be duly paid, all the real and personal estate, surplus moneys, &c., should be re-transferred to the debtor for his own absolute use and benefit; and a further proviso that, if any instalment should be unpaid, the trustees should hold and realize the estate upon trust to pay all expenses, &c., including the debts incurred in carrying on and winding up the business, and then pay the creditors rateably in full; and the deed concluded with a declaration that it was intended to operate as an inspectorship and composition deed under the Bankruptcy Act,

TRUSTEE UNDER INSPECTORSHIP DEED—*cont.*
1861.—After the execution of the deed, the debtor continued to manage the business as before, paying all moneys received by him to a banking-account kept by the trustees. The trustees met at the works weekly, inspected the books, and furnished the debtor with money to meet all disbursements which would be required during the ensuing week for wages, materials, and petty-cash; but they gave him no authority to pledge their personal credit.—In an action for goods supplied to the works upon orders given by the debtor in his own name:—*Held*, upon the authority of *Redpath* v. *Wigg* (Law Rep. 1 Ex. 335), that, the whole scope of the deed being, not to transfer the business to the trustees, but that it should remain the business of the debtor, though carried on by him under the inspectorship and control of the trustees, the latter were not liable for goods supplied to the debtor upon credit. Easterbrook *v.* Barker - 1

TWELVE-POUND OCCUPIERS, LIST OF—County vote - - - - - 272
See Vote for Parliament. 7.

UNDUE PREFERENCE—Railway Company 194, [554
See Railway and Canal Company Act, 1854.

UNION ASSESSMENT ACT - - - 414
See Appeal to Quarter Sessions.

UNREASONABLE CONDITION - - 120
See Conditions of Sale.

VARIATION OF ORDER—Agreement to refer—Costs - - - - 259
See Agreement to Refer.

VENDOR AND PURCHASER—Conditions of sale *See* Conditions of Sale - - [120

VENUE—Change of - - - - 116
See Change of Venue.

VOTE FOR PARLIAMENT—*Borough Vote—Residence—Lodger*—30 & 31 *Vict. c.* 102, *s.* 4, *subs.* 3.] A. being employed to attend upon a gentleman, lodgings were taken for him in the same house as the gentleman, in which he might and did usually sleep, but he was not bound by his agreement to do so. A. had also lodgings in the borough of C., where his wife and children resided, and in which he could sleep at any time, and did in fact sleep at least once a week:—*Held*, that A. resided in the lodgings in the borough of C., within the meaning of 30 & 31 Vict. c. 102, s. 4, subs. 3, and was entitled to vote as a lodger for the borough of C. Taylor *v.* The Overseers of St. Mary Abbott, Kensington - - - - - 309

2. —— *Borough Vote—Residence—Lodger*—30 & 31 *Vict. c.* 102, *s.* 4, *subs.* 3.] A. occupied lodgings in a borough in London, separately and as sole tenant, for the requisite twelve months. He had also a house in the county of D., where he kept an establishment of servants all the year round. When in London he resided at the lodgings, and had done so at intervals for two months out of the twelve:—*Held*, a sufficient residence within the meaning of 30 & 31 Vict. c. 102, s. 4, subs. 3, to entitle A. to vote as lodger for the borough. Bond *v.* The Overseers of St. George, Hanover Square - - - - 312

VOTE FOR PARLIAMENT—*continued.*

3. —— *Borough Vote—Part of a House—Separate Rating under* 30 & 31 *Vict. c.* 102, *s.* 61—*Construction of s.* 19 *of the Poor-rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41).] To entitle the occupier of part of a house to the franchise, under ss. 3, 61 of 30 & 31 Vict. c. 102, he must, notwithstanding the proviso in s. 19 of 32 & 33 Vict. c. 41, be separately rated to the relief of the poor, unless the case is brought within s. 3 or s. 4 of the last-mentioned Act.—S. 19 of 32 & 33 Vict. c. 41 enacts that "the overseers, in making out the poor-rate, shall in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid;" and provides that "any occupier whose name has been omitted shall, notwithstanding such omission and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted:—*Held*, that this section applies only where there has been an agreement in writing under s. 3, between the overseers and the owner of the premises, to receive the rates from him, or where there has been an order by the vestry for rating the owner instead of the occupiers, under s. 4. Cross *v.* Alsop - - 315

4. —— *Borough Vote—"Part of a House"—Structural Severance—Reform Act* (2 *Wm.* 4, *c.* 45, *s.* 27)—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 61—"*Dwelling-house.*"] A. claimed to be registered for a borough in respect of "a house." He occupied as tenant at 4*l.* 10*s.* per annum *one room* in a house, which consisted of nine rooms, and was originally built for one family, though now let out in six several tenements. The passage and staircase, and the conveniences, consisting of a privy and ashpit, were common to all the tenants. There was an outer or street-door to the passage, which was never closed, and was without lock or bolt. Each tenant had the exclusive occupation of his room or rooms. The owner did not reside upon the premises:—*Held*, by Bovill, C.J., and Keating, J., that the room so occupied by the claimant constituted a "dwelling-house" within ss. 3 and 61 of the Representation of the People Act, 1867.—*Held*, by Willes and Brett, JJ., that it did not.—B. claimed to be registered for a borough in respect of "a house." He occupied as tenant at 6*l.* 10*s.* per annum *two rooms* on two different floors in a house, which consisted of seven rooms, whereof the remaining five were occupied by another tenant. The passage and staircase were common to both tenants. The house had a front door to the street, which was generally kept open by day, and shut by one or other of the tenants at night, and was fastened by an ordinary latch and bolt. Neither tenant had any right to exclude the other from the use of the front door. The owner did not reside upon the premises:—*Held*, by Bovill, C.J., and Keating, J., that such occupation of the two rooms by B. was the occupation of a "dwelling house" within ss. 3 and 61 of the

VOTE FOR PARLIAMENT—*continued.*

Representation of the People Act, 1867.—*Held*, by Willes and Brett, JJ., that it was not. *Cook* v. *Humber* (11 C. B. (N.S.) 33; 31 L. J. (C.P.) 73) commented upon. Thompson *v.* Ward. Ellis *v.* Burch - - - - - - 327

5. —— *Borough Vote—Payment of Rates—30 & 31 Vict. c.* 102, *s.* 3, *subs.* 4—*Payment excused by reason of Poverty—54 Geo.* 3, *c.* 170, *s.* 11.] A. claimed, in 1870, to be placed on the list of inhabitant occupiers under s. 3 of the Representation of the People Act, 1867. His landlord was rated to the relief of the poor in respect of the qualifying premises to all the rates made within the year. A previous rate, in which A. was rated, had been made in June, 1869, from payment of which he was, in October, 1869, excused by the justices, under 54 Geo. 3, c. 170, s. 11:—*Held*, that A. had not bonâ fide paid "an equal amount in the pound with that payable by other ordinary occupiers, in respect of *all* poor-rates that had become payable by him in respect of the qualifying premises up to the preceding 5th of January," within 30 & 31 Vict. c. 102, s. 3, subs. 4, and was therefore not entitled to be registered. Abel *v.* Lee - - - - - - - 365

6. —— *County Vote—Lessee or Assignee—Chattel Rent-charge—30 & 31 Vict. c.* 102, *s.* 5.] By 30 & 31 Vict. c. 102, s. 5, a county vote is conferred upon every man who is entitled either as lessee or assignee to any lands or tenements of freehold, or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years, of the clear yearly value of not less than 5*l.*:—*Held*, that a person, to be entitled to a vote under this provision, must be lessee of a corporeal hereditament, which could be the subject of occupation, or assignee of a lease of such an hereditament; and that a chattel rent-charge, though originally created for more than sixty years, does not confer a vote. Warburton *v.* Overseers of Denton - - - 267

7. —— *County Vote—List of* 12*l. Occupiers—Inaccuracy of Heading—Amendment—6 Vict. c.* 18, *ss.* 40, 101—30 & 31 *Vict. c.* 102, *s.* 30—31 & 32 *Vict. c.* 58, *s.* 19.] C. was entitled to be and was placed by the overseers upon the list of persons qualified to vote for the county by reason of the occupation of lands or tenements of the rateable value of 12*l.* or upwards per annum, prepared by them in pursuance of 30 & 31 Vict. c. 102, s. 30, and 31 & 32 Vict. c. 58, s. 19. This list, which was headed "Voters as occupiers of rateable value of 12*l.* or upwards," was printed alphabetically after the list of persons entitled to vote in respect of property in the parish, and signed at the end by the overseers: but the printer, by mistake, on sheet which commenced with C.'s name, inserted the heading applicable to the preceding list, viz. "list of persons entitled to vote in respect of *property*." The overseers published the list as printed. There was no evidence that any person had in fact been misled.—The revising barrister decided that there had not been a publication of the list as a 12*l.* list, and that the interpolated heading was not "a misnomer of a thing so denominated as to be commonly understood," within the meaning of s. 101; and he therefore expunged the name of C. and all the names which followed his upon the list.—The Court, on appeal, reversed his decision; and held that there had been a sufficient publication of this part of the list as a 12*l.* list. Mather *v.* Overseers of Allendale - 272

8. —— *County Vote—Description of Qualification—"Freehold Rent-charge accruing out of Freehold Houses"—Amendment under* 6 *Vict. c.* 18, *s.* 40.] In the list of claims to vote for a county, the qualification of the claimant was described, "Freehold rent-charge of 16*l.* per annum accruing out of freehold houses." The proof in support of the claim was that the claimant was owner in fee of the land on which stood four houses which he had let on lease for a long term at 16*l.* per annum:—*Held* (Willes, J., doubting), that this was not an insufficient or inaccurate description of the nature of the qualification, but a misdescription which the revising barrister had no power to amend under s. 40 of 6 Vict. c. 18. Nicholls *v.* Bulwer - - - - - 281

9. —— *County Vote—Mortgage—Building Society—Monthly Payments for Principal, Interest, and Expenses—Yearly Value—8 Hen.* 6, *c.* 7—28 *Geo.* 3, *c.* 36, *s.* 6—6 *Vict. c.* 18, *s.* 74.] A member of a benefit building society was possessed of freehold hsuses, which he had conveyed by way of mortgage to the society as security for an advance of 300*l.* By the terms of the deed and the rules of the society, he was bound, in order to redeem the property, to pay to the society, during a period of ten years from 1863, monthly instalments, for principal, interest, and expenses, which amounted in the whole to 41*l.* 8*s.* each year, two-thirds of which was in discharge of principal, and one-third in payment of interest; and, in case of certain defaults, a power of entry was reserved to the society. The interest, which was not more than 7 per cent. for the term, was capitalized, and added to the sum borrowed. The mortgagor had paid 350*l.*, and two years remained during which he still had to pay the monthly instalments; but he was entitled to redeem the property by a present payment of 73*l.* 1*s.* The annual value of the houses was 31*l.* 4*s.*:—*Held* that, in ascertaining the yearly value of the estate to the mortgagor, the interest only was to be deducted, and not the payments made in reduction of the principal mortgage-debt, and consequently that the mortgagor had an estate of more than the yearly value of 40*s.* above all charges in respect of which he was entitled to a vote for the county.—*Copland* v. *Bartlett* (6 C. B. 18; 15 L. J. (C.P.) 50), and *Beamish* v. *Stoke* (11 C. B. 29; 21 L. J. (C.P.) 9), considered.—*Robinson* v. *Dunkley* (15 C. B. (N.S.) 478; 33 L. J. (C.P.) 57), followed. Rolleston *v.* Cope - - - - - - 292

WILL—Devise—Accruing share - **Ex. Ch. 532**
See Accruing Share.

—— Repugnant provisions - - **Ex. Ch. 500**
See Repugnant Provisions in Will.

WITNESS—Bill of sale - - - 98
See Affidavit with Bill of Sale.

WORDS—"Dwelling-house" - - 327
See Vote for Parliament.

WORDS—*continued.*

—— "Fish known as river fish" - - 570
See Fence-season for Fish.

—— "General line of buildings" - - 87
See General Line of Buildings.

—— "Improper navigation" - - 563
See Improper Navigation.

—— "Judgment" - - - - 245
See Costs of Prohibition.

WORDS—*continued.*

—— "Plying for hire" - - - 481
See Hackney Carriage. 1.

—— "Tillage" - - - - 470
See Tillage.

—— "Taxes and Assessments" - - 228
See Covenant to pay Taxes and Assessments.

YEARLY VALUE—County vote - - 292
See Vote for Parliament. 9.

END OF VOL. VI.

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